No. 89-1346

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

AUTOMOBILE CLUB OF NEW YORK, INC. and AAA CLUBS OF NEW JERSEY,

Petitioners,

against

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, PHILIP D. KALTENBACHER, ROBERT F. WAGNER, RICHARD C. LEONE, JAMES G. HELLMUTH, HENRY F. HENDERSON, JR., WILLIAM K. HUTCHISON, H. CARL McCALL, JOHN G. McGOLDRICK, WILLIAM J. RONAN, HOWARD SCHULMAN, ROBERT VAN BUREN and HAZEL FRANK GLUCK, as Commissioners of the Port Authority of New York and New Jersey,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

The Port Authority of New York and New Jersey ("Port Authority") owns and operates various transportation facilities which comprise its Interstate Transportation Network ("ITN"), including four interstate bridges, two interstate tunnels, one bus terminal and the Port Authority Trans-Hudson Railroad ("PATH"). In consenting to the construction and operation of the four interstate bridges, Congress required that bridge tolls be reasonable and just. On April 12, 1987, Port Authority increased the round-trip, eastbound passenger car toll for transit across its bridges and tunnels from $2.00 to $3.00, primarily as a result of a rising PATH deficit and Port Authority's plans to spend nearly <u>one billion</u> dollars in

capital improvements on PATH. The questions are:

1. Under the just and reasonable clause of §135(i) of the Federal-Aid Highway Act of 1987, 33 U.S.C. §508 (Supp. 1989), may bridge tolls be increased in order to subsidize mass transit railway deficits, without the consent of Congress?

2. May bridge users be required to subsidize mass transit railway deficits under §135(i) in the absence of proof that the railway fare is set at a competitive rate?

STATEMENT PURSUANT TO RULE 28.1

Neither the Automobile Club of New York, Inc. nor the AAA Clubs of New Jersey have corporate parents or subsidiaries. Each of the clubs is affiliated with the

American Automobile Association, which is a not-for-profit corporation comprising a federation of 154 member clubs throughout the United States.

PARTIES TO THE PROCEEDINGS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, which this petition seeks appeal of, was rendered on October 10, 1989. It appears at 887 F.2d 417 and has been reproduced as Appendix A hereto. Subsequent to its decision, the Second Circuit denied a request for a rehearing en banc of the appeal on November 21, 1989. The court's order denying rehearing has been reproduced as Appendix B hereto. The decision of the United States District Court for the Southern District of New York, from which petitioners appealed, accompanied by additional findings of fact and conclusions of law, was rendered on February 9, 1989, and corrected February 15,

1989. It appears at 706 F. Supp. 264 and has been reproduced as Appendix C hereto.[1]

JURISDICTION

This action was brought by the petitioners in the United States District Court for the Southern District of New York seeking, inter alia, declaratory and injunctive relief against the imposition of a toll increase for automobile travel across Port Authority's bridges and tunnels. Jurisdiction in the District Court was predicated on 28 U.S.C. §§1331 and 2201-02 and under the principle of pendent jurisdiction. The District Court denied the requested relief.

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[1] The District Court's additional findings of fact and conclusions of law have not been reproduced. They may be found, however, at 706 F.Supp. 278-284.

On October 10, 1989, the Second Circuit Court of Appeals affirmed the District Court's decision and sustained the toll increase. On November 21, 1989, the Second Circuit denied petitioners' request for a rehearing en banc of the appeal. The decision was entered on the same date.

This Court has jurisdiction to review the decision of the Second Circuit by writ of certiorari pursuant to 28 U.S.C. §1254(1) and Rules 17.1 (a) and (c) of the Rules of the Supreme Court of the United States.

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

Section 135(i) of the Federal-Aid Highway Act of 1987 ("the 1987 Highway Act"), 33 U.S.C. §508 (Sup. 1989), provides:

> Tolls for passage or transit over any bridge constructed under the authority of the Act of March 23, 1906 (34 Stat. 84; 33 U.S.C. 491-498), commonly known as the

"Bridge Act of 1906," the General Bridge Act of 1946, and the International Bridge Act of 1972 shall be just and reasonable.

THE PETITIONERS

The Automobile Club of New York, Inc. and the five AAA Clubs in New Jersey which comprise the AAA Clubs of New Jersey ("Auto Clubs"), an unincorporated association, are not-for-profit entities with a combined membership in excess of 1.7 million members. The Auto Clubs were organized for the purpose of promoting the interest and welfare of motor vehicle users and many of their membership make use of the Port Authority bridges and tunnels involved in this action.

STATEMENT OF THE CASE

This case has its genesis in the unanimous opinion of the United States Court of Appeals for the Second Circuit in Auto. Club of New York, Inc. v. Cox, 592 F.2d 658 (2d Cir. 1979), which was authored by the late Judge Henry J. Friendly. That action was commenced by the Auto Clubs seeking review of the decision of the Federal Highway Administrator ("Administrator") sustaining an increase in the round-trip passenger car toll from $1.00 to $1.50 for passage across Port Authority's bridges and tunnels. The Federal Highway Administration at that time was the exclusive federal agency whose function was to insure that tolls charged for transit across bridges constructed pursuant to the Act of March 23, 1906 ("Bridge Act of 1906"), 33 U.S.C. §§491-

498, including Port Authority's four interstate bridges, the George Washington Bridge, the Goethals Bridge, the Outerbridge Crossing and the Bayonne Bridge, were "reasonable and just" and "from time to time, prescribe the reasonable rates of toll for such transit over such bridge." See 33 U.S.C. §494 (1986) (amended 1987). The purpose of the 1975 toll increase was to allow Port Authority to finance certain mass transit projects. See United States Trust Co. v. New Jersey, 431 U.S. 1, 14 (1977); Cox, supra, 592 F.2d at 662.

After painstaking analysis, Judge Friendly concluded that keeping tolls high to provide added income to PATH in order to fund its "huge" and "staggering" deficits was "a giant leap from anything previously taken into account in determining appropriate rates under the 'reasonable and

just' provision of the General Bridge Act of 1906." See Cox, supra, 592 F.2d at 668, 672. The "huge" and "staggering" PATH deficit under consideration at that time amounted to $34.1 million, already far above the $6.6 million annual net loss that was initially projected for PATH between 1969 and 1991. See United States Trust Co., supra, 431 U.S. at 11-12; Cox, supra, 592 F.2d at 668. Indeed, Port Authority has projected the 1991 annual PATH deficit to reach $133.7 million. See App. 140-141.[2]

Although Judge Friendly affirmed the District Court's opinion and sustained the 1975 toll increase under an arbitrary and capricious standard of review of the

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[2] "App." followed by a designated page number refers to pages in the Petitioners' Appendix.

Administrator's decision,[3] he invited the Auto Clubs to file a "new protest, taking account of points raised in [the court's] opinion and others, unless new legislation or the regulations required by §133(b) of the Federal-Aid Highway Act of 1973 [("1973 Highway Act")], which would remove or alter the points in controversy, is forthcoming within a reasonable time." See Cox, supra, 592 F.2d at 673. Proposed legislation governing toll increases, however, was never submitted to Congress.

In 1984, Port Authority raised its tolls on its bridges and tunnels from $1.50

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[3] Judge Friendly suggested that if the standard of review was substantial evidence rather than arbitrary and capricious, the Administrator's decision sustaining the 1975 toll increase would not have been upheld. See Cox, supra, 592 F.2d at 673. Further, under an arbitrary and capricious standard of review, Judge Friendly was reluctant to adopt the "all or nothing" position espoused by the Auto Clubs which sought to limit the rate base to only the four bridges. Id.

to $2.00. The Auto Clubs challenged the 1984 toll increase before the Federal Highway Administration. A bridge toll investigation was commenced by the agency pursuant to its regulations. See 49 C.F.R. §310.5 (1985), repealed by 33 U.S.C. §508. The investigation team determined, based on Judge Friendly's decision, that "as a matter of law" PATH must be excluded from the rate base used to set bridge tolls, but recommended that the toll increase be sustained because a rate of return of 9.39% based on a rate base which included Port Authority's four bridges, two tunnels and bus terminal, fell within a "zone of reasonableness." See App. 142-146. Subsequently, in an order dated June 19, 1985, the Administrator adopted the findings of his investigation team. See App. 147-151. In reaching its determination that PATH, as well as certain

other facilities operated by Port Authority, must be excluded from the rate base used to set bridge tolls, the investigation team concluded:

> The bridge users are protected by assuring that they are only supporting facilities from which they receive a direct and significant benefit. If the Port Authority were allowed a revenue requirement based on its total activities or on its total surface transportation facilities, it would be free to invest in deficit operations secure in the knowledge that they could charge the bridge users for support of such activities. A finding along those lines would be contrary to the statutory duty to protect bridge users' interests and would be an abdication of statutory responsibilities.

See App. 143-144.

In April 1987, in the last of a trilogy of toll increases in just over a decade, Port Authority raised its bridge and tunnel tolls from $2.00 to $3.00. The toll increase was necessary primarily as a

result of a rising PATH deficit and Port Authority's plans to spend nearly one billion dollars in capital improvements on PATH. See App. 130-141.[4] The Auto Clubs commenced proceedings before the Federal Highway Administration. However, before disposition of their complaint, Congress enacted the 1987 Highway Act and transferred jurisdiction over the regulation of tolls to the courts. See App. 7. This action was thereafter

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[4] The operating deficit of Port Authority's Interstate Transportation Network ("ITN") is caused by the huge PATH deficits. Indeed, Port Authority's 1986 Operating Results indicate that the bridges, tunnels and bus terminal produced revenues of $243.7 million against expenses of $196.5 million. See App. 130-131. Moreover, Port Authority's $1.5 billion capital program allocated only $495 million for the bridges, tunnels and bus terminal. With respect to PATH, Port Authority allocated $830 million and another $150 million was to be used to establish a ferry service between Hoboken and Lower Manhattan for the purpose of reducing pressure on PATH. See App. 8, 153-155.

commenced in the United States District Court for the Southern District of New York.

As recounted in United States Trust Co., supra, Port Authority was initially reluctant to become involved in "'commuter transit.'" 431 U.S. at 6. "'[G]reat costs were envisioned, and substantial deficits were predicted for any mass transit operation.'" Id. at 8. Indeed, when Port Authority acquired PATH in 1962, previously known as the Hudson and Manhattan Railroad, it had been in reorganization for many years and was without sufficient cash for capital expenditures. Id. at 9.

The rate of return Port Authority is projected to earn on its unamortized investment in use in its bridges, tunnels and bus terminal for the years 1987-1991 under the 1987 toll increase averages nearly 17%, almost double the rate of

return found reasonable by the Administrator in the proceedings challenging the 1984 toll increase. See App. 132-141; Automobile Club of New York v. Port Authority, supra, 706 F.Supp. at 283 (Finding of Fact No. 55). With PATH included in the rate base, the rate of return turns negative. See App. 132-141. Of every $3.00 fare paid by motorists, almost $1.00 of that amount will be used to subsidize the projected PATH deficit for the years 1987-1991.[5] PATH does not provide an alternative for the majority of motorists using the bridges and tunnels. Indeed, as of 1983, 60% of the vehicles using Port Authority's bridges and tunnels

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[5] The 1987-1991 Operating Results of Port Authority's ITN (See App. 132-141) indicate that total projected toll revenue for the bridges and tunnels between 1987-1991 is $1.84 billion. For those years, the total projected PATH deficit is $558.9 million. This figure represents 30% of all toll revenue collected.

on weekdays have neither origin nor destination in Manhattan. See App. 172-174. This percentage rises to more than two-thirds on weekends. Id.

In finding the inclusion of PATH to constitute a "giant leap from anything previously taken into account in determining appropriate rates under the 'reasonable and just' provision of the Bridge Act of 1906" in Cox, Judge Friendly rejected the propriety of loading PATH's huge deficits onto the users of Port Authority's bridges -- "three of which have almost no functional relationship [to PATH] and the fourth, the George Washington Bridge, only a small one" -- absent Congressional action. See Cox, supra, 592 F.2d at 672.

Judge Friendly analyzed the relationship between PATH and the bridges based on the origins and destinations of

the users of those facilities. He concluded that PATH bore almost no functional relationship to Port Authority's three Staten Island Bridges. With respect to the George Washington Bridge, Judge Friendly concluded that only a "small" functional relationship existed because its traffic was "'predominately peripheral'" and that "shutting down PATH thus would affect it in the first instance less than the tunnels; it is the overcrowding of the latter that might congest the [George Washington] Bridge." See Cox, supra, 592 F.2d at 671-672.

At the trial of this action, the Port Authority conceded the continued lack of functional relationship between PATH and the Staten Island Bridges, and the existence of only a small functional relationship between PATH and the George Washington Bridge, based on the origins and

destinations of the users of those facilities. See App. 165-169. Indeed, a 1987 Port Authority study admitted into evidence entitled "Staten Island Bridges Study" concluded that "transit plays virtually no role" in the market served by the Staten Island Bridges and "transit would be an impractical alternative" for most persons commuting between New York and New Jersey via the Staten Island Bridges. See App. 176-178. The evidence at trial also indicated that the George Washington Bridge primarily functions as a "northern bypass" and thus its traffic is still "'predominately peripheral.'" See Cox, supra, 592 F.2d at 672; App. 153.

While Port Authority did not contend at trial that a functional relationship existed between PATH and the bridges based on origin and destination data, it has asserted that without PATH its ITN doesn't

work and would "'break down completely.'" See App. 87, 159. Port Authority contends that a relationship exists between PATH and the bridges because if PATH were abandoned, a "spillover" or "domino" effect would result, increasing congestion at its other transportation facilities. See App. 24-27, 87-88, 156-159.

The documentary evidence at trial, however, is directly contrary to the existence of a spillover or domino effect of any substance if PATH were abandoned, assuming the relevance of this argument.[6] Evidence was introduced at trial which established that when PATH was out of service for prolonged periods during PATH strikes in 1973 and 1980, there was no major increase in vehicular traffic at Port

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[6] See, infra, n. 10.

Authority's bridges.[7] Indeed, in 1980, when the PATH strike lasted nearly three months, only 16% of PATH passengers diverted to automobile travel across its vehicular crossings; no significant number of PATH passengers apparently diverted to bus travel across its bridges. See App. 174. The Port Authority witness did not know what percentage of the 16% diverted to auto travel across its bridges, but stated that a majority of the PATH ridership was accommodated at the Holland and Lincoln Tunnels. See App. 161-162.

In an Opinion and Decision, dated February 9, 1989, accompanied by additional findings of fact and conclusions of law, the District Court dismissed the Auto Clubs' amended complaint in its entirety.

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[7] In 1973, the PATH strike lasted nine weeks and there was no major increase in automobile usage at Port Authority's bridges and tunnels. See App. 179-181.

See App. 67-129. The District Court concluded that "[t]he closing of one or more of the Port Authority's under and cross-water facilities ... results in a 'spillover,' or 'domino,' effect, increasing congestion in the others" and that, despite the PATH strike data, if PATH were abandoned, "Port Authority's interstate transportation system would 'break down completely.'" See App. 87-88.

The Auto Clubs also contended at trial that if PATH were included in the rate base used to set bridge tolls, no determination could be made that the toll increase was just and reasonable without evidence that the PATH fare was set at a competitive rate. The District Court concluded that PATH users were paying their fair share, despite conceding that the Port Authority did not "conduct[] any formal studies on the effect of various PATH fare levels on

PATH ridership." See App. 122-125. Indeed, "[n]o study was made of that." See App. 170-171, 182.

Over the emphatic dissent of Judge Van Graafeiland, who sat on the prior panel with Judge Friendly and Judge Timbers, a majority of the Second Circuit affirmed the District Court's opinion. See App. 1-38. The majority determined that the principle of Clarksburg-Columbus Short Route Bridge Co. v. Woodring, 89 F.2d 78 (D.C.Cir.), reversed and remanded for dismissal as moot, 302 U.S. 658 (1937), one of the only two cases construing the Bridge Act of 1906 prior to Judge Friendly's decision, "would mutatis mutandis, support the inclusion of [the different facilities owned and operated by Port Authority] in a single rate base if they are related to each other." See App. 13 (emphasis in original). The majority agreed with the

District Court that the spillover or domino effect which would allegedly result if PATH were abandoned, justified its inclusion in the rate base. The majority stated:

> The Port Authority is entitled to prove that PATH is related to the bridges and tunnels with evidence that a "spillover" effect links even those river crossings that travelers do not normally use interchangeably. A functional relationship exists, then, among those facilities that contribute to the Port Authority's performance of its duty efficiently to provide transportation to travelers over and under the waterways between southern New York and northern New Jersey.

See App. 25-26.

In dissent (see App. 38-63), Judge Van Graafeiland disagreed with the majority's circumvention of Cox:

> Eleven years ago, I sat on a panel with two of the strongest members of this Court, Judges Friendly and Timbers. We listened to the identical arguments that the Port Authority

> made to the present panel, and we rejected them.
>
> * * *
>
> I respectfully disagree with my present colleagues' attempts to distinguish our 1979 decision. Although I do not profess to have greater legal acumen than they, I have something that they lack -- firsthand knowledge of what transpired on the prior appeal. With the benefit of this background, I am convinced that there is no material difference between the 1979 case and the instant case. In short, the instant appeal is a classic example of deja vu.

See App. 38-41. Moreover, Judge Van Graafeiland disagreed with Port Authority's spillover argument which, he noted, the prior panel fully considered and rejected. See App. 47-49.[8] Finally, Judge Van

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[8] On this basis, "in accordance with our prior decision," Judge Van Graafeiland would hold, "until Congress authorizes the Port Authority to do otherwise, the Authority must limit the rate base for the George Washington and the Staten Island Bridge tolls to the bridges, the tunnels and the bus terminals." See App. 62-63.

Graafeiland concluded that no determination could be made that Port Authority's tolls are just and reasonable without examining the PATH fare. See App. 51-62. Finding the PATH fare prima facie unreasonably low, based on the lack of study of the effect of various PATH fare levels on PATH ridership and evidence that the PATH fare was set far below competitive fares, Judge Van Graafeiland recommended, in the alternative, that the case be remanded to the Port Authority "for reconsideration of all the tolls and the making of a reasonable and just allocation of fares and tolls supported by complete and adequate factual findings." See App. 51-63.

REASONS FOR GRANTING THE PETITION

In just over a decade, bridge users have seen the toll for passage across Port Authority's bridges rise from $1.00 to $3.00 in large part due to the enormous annual deficits incurred by PATH. Just recently, Port Authority has publicly announced in an article appearing in The New York Times on January 4, 1990 plans to raise the the round-trip passenger car toll for its bridges and tunnels $1.00 in April 1990, $1.00 in October 1991 and $1.00 in July 1993, to a grand total of $6.00. See App. 189. The extra revenue generated by these toll increases is necessary, in part, for the continued maintenance and rehabilitation of PATH, as well as to "'initiate major new interstate transportation projects.'" Id. at 190-192.

Whether bridge revenues may be used to subsidize mass transit railway deficits, and to what extent, is an issue of first impression under the 1987 Highway Act. Indeed, it is an issue of federal law of national importance which should be settled by this Court.

When Congress enacted the 1973 Highway Act, it expressly directed the Secretary of Transportation to "promulgate regulations establishing guidelines governing any increase in tolls for use of any bridge constructed pursuant to either the General Bridge Act of 1906 or the General Bridge Act of 1946." See 33 U.S.C. §526(a), repealed by 101 Stat. 174. With this direction, the Secretary of Transportation undertook "A Study of Federal Statutes and Regulations Governing Toll Bridges" ("Bridge Toll Report") in July, 1974, preparatory to the submission of

legislation and for the purpose of "'determining what action can and should be taken to assure just and reasonable tolls nationwide.'" See Cox, supra, 592 F.2d at 667 n.11. No legislation, however, was submitted to Congress.

In 1974, ninety-four toll bridges were subject to federal toll regulation under the Bridge Act of 1906, the Bridge Act of 1946, 33 U.S.C. §§525-533, and the International Bridge Act of 1972, 33 U.S.C. §§535-535i.[9] With passage of the 1987 Highway Act, Congress made all tolls charged on bridges constructed pursuant to the Bridge Act of 1906, the Bridge Act of 1946 and the International Bridge Act of

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[9] See Bridge Toll Report, Table 1, App. 196-197. Six additional bridges were subject to federal toll regulation under 33 U.S.C. §129(a) and another seven privately owned interstate bridges were thought to be subject to the reasonable and just test. Id.

1972 subject to the just and reasonable test. See 33 U.S.C. §508.

Accordingly, this Court's construction of the just and reasonable clause in the context of this case will impact upon every one of the ninety-four bridges whose tolls are now subject to the just and reasonable test and settle the considerable uncertainty as to whether, and under what circumstances, tolls may be charged in excess of the costs of constructing, operating, maintaining, and repairing the bridge and be set at a rate which, in addition, would allow for the subsidization of mass transit. Moreover, as Judge Van Graafeiland stated in dissent in this case, "[w]hen Congress transferred the exercise of [the Administrator's jurisdiction over tolls] to the district courts, it surely anticipated that the courts would not approve the Authority's claim of

reasonableness without receiving and passing upon facts and figures to support it." See App. 51. In this case, the majority did not agree that any such burden fell upon the bridge owner to justify the reasonableness of its tolls and fares with "facts and figures to support it" and sustained Port Authority's toll increase upon the conclusory testimony of Port Authority witnesses. This case calls into question the relative burdens of proof of the bridge owner and the complainant in proceedings challenging bridge tolls in the district courts under the 1987 Highway Act.

Finally, the petition should be granted because the Second Circuit's decision requiring bridge users to subsidize the massive deficits of PATH, without limitation, is, in the words of Judge Friendly, "a giant leap from anything previously taken into account in

determining appropriate rates under the 'reasonable and just' provision," is contrary to the only two other decisions construing the Bridge Act of 1906, Clarksburg-Columbus, supra, and City of Burlington v. Turner, 471 F.2d 120 (8th Cir. 1973), and is contrary to the legislative history of the 1987 Highway Act.

1. There Is No Authority Under The Reasonable And Just Clause Allowing Port Authority To Subsidize Mass Transit Railway Deficits

Both the District Court and the Second Circuit majority found Congress with its enactment of the 1987 Highway Act to have provided "sufficient 'flexibility' to permit the Port Authority to include facilities other than bridges, tunnels and terminals in its rate base." See App. 11,

36-37. This conclusion, however, is erroneous.

When Congress passed the 1987 Highway Act, it stated in the Conference Report accompanying the legislation that:

> [T]he just and reasonable clause is not intended to interfere with or in any way restrict existing authority granted to multi-modal transportation agencies, such as the Port Authority of New York and New Jersey, that operate bridges along with other facilities, to use bridge toll revenues for non-bridge purposes or the pooling or combination of the revenues from all of their facilities. (emphasis added).

See H.R. Conf. Rep. No. 27, 100th Cong., 1st Sess. 175, reprinted in 1987 U.S.Code Cong. & Admin. News 66,159. However, when this language was discussed in Congress, concern was raised as to whether §135 or anything in the Conference Report "changes in any way the 'just and reasonable' standard as it has been applied under existing laws and existing authorities":

> Mr. Molinari. *** Subsequent to the House passing the conference report on H.R.2, a number of questions have been raised as to whether section 135, or the statement of managers accompanying section 135, changes in any way the 'just and reasonable' standard as it has been applied under existing laws and existing authorities. Would the distinguished chairman and ranking minority member care to comment?
>
> Mr. Howard. Mr. Speaker, if the distinguished gentleman from New York will yield, neither section 135 nor the statement of managers changes the standard to be applied in determining whether a toll increase is just and reasonable. The only thing we have changed is the forum for making that determination.

See App. 198-201.

The only existing laws and authorities at that time regarding Port Authority's ability to use bridge revenues for non-bridge purposes was Judge Friendly's decision in Cox, supra, which indicated that Port Authority could not use bridge

revenues for PATH, and the Administrator's 1985 decision concerning Port Authority's 1984 toll increase, which held "as a matter of law" that PATH must be excluded from the rate base used to set bridge tolls. See App. 149-150.

Moreover, the Conference Report does not state that Port Authority may use bridge revenues for non-bridge purposes other than the "bridges, tunnels and terminals," as suggested by the Second Circuit majority. See App. 11, 36-37. Nor does it state that bridge revenues may be used to provide added income to PATH in order to fund its huge deficits. Indeed, PATH is not mentioned. Certainly, it cannot be maintained that when Congress used the term "non-bridge purposes," it meant any non-bridge purpose. Clearly, bridge revenues could not be used for the World Trade Center or the airports, which

are owned by Port Authority. See Cox, supra, 592 F.2d at 663 n.8.

Indeed, the legislative history of the 1987 Highway Act, rather than supporting the Second Circuit's decision, flatly contradicts it and is a reaffirmation of those existing laws and authorities which in no uncertain terms found Port Authority's use of bridge revenues to provide added income to PATH unjust and unreasonable. Further, the only other existing authorities interpreting the Bridge Act of 1906 are City of Burlington, supra, and Clarksburg-Columbus, supra, and they too provide no support for the Second Circuit's interpretation of the reasonable and just clause to require bridge users to subsidize PATH's huge deficits without limitation.

In City of Burlington, supra, 471 F.2d at 120, Burlington sought to abolish a free

return receipt on the McArthur Bridge in order to raise revenue for general municipal purposes, the financing of salary increases for policeman and firemen. Although the Eight Circuit Court of Appeals held that the bridge owner was entitled to a reasonable return on invested capital, over and above the costs of maintaining, repairing and operating the bridge, and providing for a sinking fund to amortize bridge indebtedness, it flatly rejected the notion that bridge tolls could be kept high in order to provide revenue for general municipal purposes such as financing salary increases for policemen and firemen. This use of bridge revenues was found to be categorically unjust and unreasonable. See id. at 123. In fact, on remand the Burlington tolls were reduced. See Cox, supra, 592 F.2d at 668 n.13.

PATH is an interstate commuter railroad "that runs from Newark, a major New Jersey city, to downtown Manhattan. En route it passes through Harrison and Jersey City. It also has a separate New York feeder running from Journal Square in Jersey City to Hoboken, New Jersey and through it to [midtown] Manhattan." See App. 58. Setting tolls on Port Authority's bridges at a rate which would provide added income to PATH to fund its huge deficits is little different than the City of Burlington using bridge revenues to provide salary increases for policemen and firemen. City of Burlington, supra, is contrary to the Second Circuit majority's inclusion of PATH in the rate base.

The other case involving the Bridge Act of 1906, and upon which the Second Circuit majority placed primary reliance, is Clarksburg-Columbus, supra, 89 F.2d at

788. The Second Circuit interpreted Clarksburg-Columbus as requiring the inclusion of PATH if PATH is "related" to Port Authority's other facilities. See App. 12-13, 20.

In Clarksburg-Columbus, supra, the owner of a bridge brought suit to restrain the Secretary of the Army's lowering the tolls on a competing bridge. The Secretary of the Army had determined that the bridge owner had no standing to challenge its determination. The District of Columbia Court of Appeals held that the bridge owner had a right to be heard at a hearing because competitive factors must be considered in fixing tolls; indeed, the court stated, competition may be a controlling factor. Id. at 793. The two bridges involved in that action were "integral parts of a single transcontinental highway" and it was

alleged that because of the reduction in tolls on one of the bridges there was a diversion of traffic which threatened the other bridge's continued operation. Id. at 794.

As Judge Friendly stated in Cox, supra, the principle of Clarksburg-Columbus requires the ratemaker "to consider whether the user may not be required to pay more than a fair return on one facility in order to maintain in business another furnishing a similar competing service." See Cox, supra, 592 F.2d at 669. Clarksburg-Columbus, however, was simply not controlling in Cox because:

> There was no showing that it was the level of the previous tolls rather than the convenience of the bridges and tunnels that was drawing traffic away from PATH or that the higher ones would increase PATH ridership. The higher bridge tolls are paid not simply by commuters who opt to use the George Washington Bridge when they could as readily have

> used PATH but by commuters for whom PATH was not a feasible alternative, by non-commuter passengers including many who were not destined to or did not originate in Manhattan or nearby New Jersey, and even by trucks.

See Cox, supra, 592 F.2d at 672.

Because PATH cannot accommodate vehicular traffic, it is not a true competitive transportation facility. Moreover, in this action, the Port Authority's witness testified that Port Authority had no evidence that the higher bridge tolls would increase PATH ridership, which was already at capacity. See App. 154, 170. Indeed, Port Authority has publicly stated that a $6 toll would have no appreciable effect on bridge, tunnel or PATH traffic. See App. 189-190, 193-194. Finally, 60% of the vehicles using Port Authority's bridges and tunnels have neither origin nor destination in Manhattan; on weekends this percentage

rises to more than two-thirds. PATH provides no alternative or benefit to these noncommuting passengers, who comprise the overwhelming majority of users of Port Authority's ITN. For all of these reasons, Clarksburg-Columbus, supra, is distinguishable. There is simply no "existing authority" which supports the Second Circuit majority's inclusion of PATH in the rate base.

2. A Relationship Based On An Alleged "Spillover" or "Domino" Effect Is Insufficient To Require Bridge Users To Subsidize PATH's Huge Deficits

Based on analysis of origin and destination data, Judge Friendly found no relationship between PATH and the bridges which would suffice under the just and reasonable test to load PATH's huge deficits onto bridge users. See Cox, supra, 592 F.2d at 669-672. The majority

concede this in footnote four of their opinion, but in a strained attempt to distinguish Cox conclude that Judge Friendly's opinion "did not consider whether a functional relationship must always be shown by such data." See App. 22 (emphasis in original). The majority then went on to state that Port Authority could prove PATH is "related" to the bridges by showing that a "'spillover' effect links even those river crossings that travelers do not use interchangeably." See App. 25-26. The spillover effect was described as the effect on Port Authority's ITN if PATH were abandoned: if PATH did not exist, "the tunnels would become overcrowded. Congestion in the tunnels would lead many travelers (including some who normally use PATH) to use the George Washington Bridge." See App. 23.

As amply demonstrated by Judge Van Graafeiland in dissent, who sat on the prior panel with Judge Friendly, the Cox court considered and rejected the alleged spillover effect. In language almost identical to the language used by the majority, Judge Friendly stated that "if PATH did not exist, the trans-Hudson tunnels and, to a lesser degree, the George Washington Bridge, would become overcrowded." See Cox, supra, 592 F.2d at 671-672. "Grant[ing] the force" of this spillover effect, Judge Friendly concluded that the inclusion of PATH was still a "giant leap from anything previously taken into account in determining appropriate rates under the 'reasonable and just' provision of the General Bridge Act of 1906." Id.

What the Second Circuit majority has done through judicial sleight of hand is

elevate the alleged spillover effect that would occur if PATH were abandoned, and which Judge Friendly previously rejected, to a sufficient enough relationship to require bridge users to subsidize PATH's huge deficits without limitation.[10]

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[10] As noted by Judge Van Graafeiland, the existence of the alleged spillover depends on the elimination or abandonment of PATH and thus "hypothesizes a crisis that in fact does not exist, a crisis predicated on the erroneous proposition that the tolls paid by captive users of the bridges and tunnels are the only proper source of additional funds for PATH's needs." See App. 48-49. Indeed, in United States Trust Co., supra, 431 U.S. at 30 n.20, this Court noted that "[t]ransportation control strategies are available that do not require direct application of revenues from bridge and tunnel tolls to subsidize mass transit."

3. The Documentary Evidence Is Contrary To The Existence Of A "Spillover" Effect

If the "spillover argument" is to control the outcome of this lawsuit, then one would expect, at a minimum, that Port Authority would offer some documentary evidence in support of its contention. No such evidence, however, has been offered by Port Authority. Rather, Port Authority's spillover argument is built upon conclusory testimony, inference, and conjecture. Moreover, the only documentary evidence in the record is directly contrary to a spillover effect of substance if PATH were eliminated. In short, Port Authority has failed to establish the existence of a spillover effect sufficient to justify loading PATH deficits onto bridge users under the just and reasonable clause.

The sole evidence of the spillover effect offered by Port Authority was the testimony of Joseph Vanacore, Port Authority's assistant executive director of its capital programs. See App. 156-159. The documentary evidence in the record, however, flatly contradicts the core of Mr. Vanacore's spillover argument -- that if PATH did not exist, Port Authority's ITN "'would break down completely.'" See App. 87, 158-159. In 1973 and 1980 when PATH was out of service for prolonged periods during PATH strikes, there was no major increase in congestion at Port Authority's bridges.[11]

The majority rejected the PATH strike data, which negates a spillover effect, because it erroneously concluded that the strike data is not representative of "what

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[11] See, supra, text at 17-20.

would happen now if PATH were to disappear permanently . . . [and] does not take into consideration the current absence of spare capacity on the bridges and tunnels to absorb displaced PATH riders." See App. 33.

First, Mr. Vanacore testified that "excess capacity" did not exist in the "last ten years" on the Port Authority's transportation facilities -- that is excess capacity did not exist at the time that the 1980 strike data was compiled. See App. 159-160. Indeed, the entire basis for Mr. Vanacore's spillover argument was: "If we didn't have PATH in this system, the situation would have been intolerable in the late 70's and in the early 80's. I think we would have had an unacceptable level of service on a daily basis at most if not all of our river crossings were we without PATH." See App. 159.

Accordingly, the Second Circuit's rejection of the PATH strike data because it "does not take into consideration the current absence of spare capacity on the bridges and tunnels to absorb displaced PATH riders" is factually erroneous. See App. 33. Moreover, the Port Authority's own evidence shows that, at a time when excess capacity did not exist on its ITN, displaced PATH passengers were in fact absorbed:

> Some 29% of the peak period interstate PATH passengers diverted to bus services to Lower Manhattan through the Holland Tunnel, 32% diverted to bus services through the Lincoln Tunnel to the Port Authority Bus Terminal, 15% diverted to rail services to Penn Station, New York and 16% diverted to auto travel across the vehicular crossings - Holland Tunnel, Lincoln Tunnel, George Washington Bridge and Staten Island Bridges.

See App. 174.

Again, it bears emphasis that Mr. Vanacore did not know what percentage of the total 16% of all PATH riders who diverted to auto travel across Port Authority's vehicular crossings diverted to Port Authority's bridges, except that a majority of the 16% of PATH passengers diverted to the Holland and Lincoln Tunnels. See App. 161-162. Quite simply, the PATH strike data is the best evidence of what would occur if PATH did not exist and it negates a spillover effect; the only contrary evidence is conclusory and self-serving testimony offered by Port Authority.

Surely, the just and reasonable clause requires more than evidence of this nature to impose Port Authority's huge deficit mass transit operations on bridge users. The Second Circuit's opinion that the spillover effect which would result is

substantial is pure speculation and surmise. There is no evidence in this record that the spillover effect considered and rejected by Judge Friendly is any different today. Although in support of its decision, the Second Circuit relied on a 22% increase in passenger traffic, not vehicular traffic, between 1980 and 1987, it has not been shown how this increase in passenger traffic somehow fundamentally changes the relationship between PATH and the bridges. See App. 33.[12] Indeed, as late as 1987, in a Port Authority report, the lack of relationship between PATH and the Staten Island Bridges was unqualifiedly confirmed. See App. 176-178. Finally, this 22% increase in passenger traffic

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[12] It is noteworthy that during the course of this litigation, Port Authority adjusted its projected toll revenue downward for 1987-1991 when projected growth in traffic did not materialize. See App. 183-188.

pales in comparison to the 292% projected increase in the PATH deficit since Cox, now in the hundreds of millions of dollars.[13]

The majority's belief that "stopgap" measures taken during the PATH strikes would not be feasible in the long run if PATH ceased to exist is similarly speculation and surmise based purely on conclusory testimony; it also ignores the fact that at the time the Second Circuit's opinion was written Port Authority began operating two new ferries to relieve pressure on PATH. See App. 48, 153-154. In the event PATH were abandoned, a conclusion without support in the record, what would prevent Port Authority from operating more ferries and taking other steps to alleviate possible congestion? In

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[13] The PATH deficit has grown from $34.1 million in 1976 to a projected $133.7 million in 1991.

the words of Judge Van Graafeiland, "[t]he argument that the closure of PATH will force all commuters to transfer to the tunnels and bridges just doesn't wash." See App. 48.

4. The PATH Fare Is Prima Facie Unreasonably Low

If it is appropriate for bridge tolls to be used to subsidize mass transit railway deficits, the reasonable and just clause demands that the PATH fare be set at a competitive rate. The Second Circuit erred in concluding that the PATH fare is "no longer 'prima facie unreasonably low.'" See App. 34-36.

The Second Circuit's primary support for its conclusion that the PATH fare is no longer prima facie unreasonably low is that the PATH fare was increased from $.30 to

$1.00 since the Cox decision. Id.[14] The Second Circuit, however, appears not to recognize that the tolls since the Cox decision were raised by almost an identical percentage, from $1.00 to $3.00. Moreover, the PATH deficit has grown astronomically since Cox and there appears to be no end in sight. Finally, the PATH fare is far below competitive fares, as amply demonstrated by Judge Van Graafeiland in dissent. For example,

> New Jersey Transit and Amtrak also have lines running from Newark to Manhattan. The fare for this service on New Jersey Transit is $2.25, on Amtrak it is

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[14] The Second Circuit also suggested that it may be argued that motorists are now in a better position than PATH users because a round-trip on PATH "costs $2.00, exactly the cost of a round-trip on the bridges and tunnels using a commuter discount ticket," and a car toll can be shared whereas each PATH rider must pay his or her full fare. See App. 34-35. However, there is no evidence in this record as to the percentage of bridge users who benefit from the commuter discount.

> $5.75. New Jersey Transit trains also run from Newark to Hoboken. The fare for this service is $1.75, to which must be added the cost of transportation across the Hudson River. The fare by New Jersey Transit bus from Newark to Manhattan is $2.95. From Hoboken to Manhattan, the bus fare is $1.70. From Newark Airport to Manhattan, it is $7.00. The fare from Newark to Manhattan by Greyhound bus is $7.00.

See App. 58. That these fares are "Representative Fares" is clear by Port Authority's own admission. In a 1973 Port Authority Trans-Hudson Corporation "Memorandum Regarding Fare Increase," Attachment F, bus and rail fares between New York and New Jersey are cited as "Representative Fares." See App. 201-202. Other examples of competitive fares abound in Judge Van Graafeiland's dissent, and they too are far above the PATH fare. See App. 56-60.

The threefold increase in the vehicular tolls, the projected increase in

the PATH deficit by 292% since the Cox decision through 1991, the evidence that the PATH fare is set far below "Representative Fares," all combined with Port Authority's admission at trial that it conducted no study of the effect of various PATH fare levels on PATH ridership, make the present PATH fare of $1.00 prima facie unreasonably low. See App. 170-171, 182. Indeed, not only has Port Authority not studied whether it can increase the PATH fare without loss of ridership, it has recently publicly stated that a rise in the PATH fare to $1.50 would have no appreciable impact on PATH ridership. See App. 189-190.[15]

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[15] Significantly, while Port Authority has announced plans to increase tolls by 1993 by 100%, from $3.00 to $6.00, it will increase the PATH fare only by 50%, from $1.00 to $1.50. See App. 189-190.

It is of no relevance that the PATH fare at the time these proceedings were commenced was equivalent to the New York City subway fare. First, the New York City subway fare is not a true competitive fare because New York City's trains do not provide commutation between New York and New Jersey. Secondly, New York has made a decision as a matter of governmental policy to subsidize mass transit and, indeed, legislation has been enacted by the State of New York expressly permitting its bridge revenues to offset transit capital and operating expenses. See N.Y. Pub. Auth. L. §§569-c.1 and 1219-a (McKinney's 1982); Cox, supra, 592 F.2d at 673 n.23. The Port Authority is prohibited from making the same policy decision. Congress must make it. See Cox, supra, 592 F.2d at 672. They have not. Port Authority has failed to

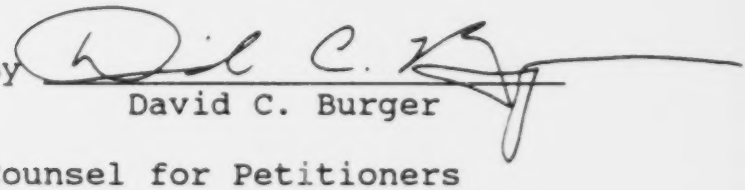
prove that the toll increase is just and reasonable.

CONCLUSION

For all of the foregoing reasons and all of the reasons stated in Judge Van Graafeiland's dissenting opinion in the Second Circuit, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

ROBINSON BROG LEINWAND REICH
GENOVESE & GLUCK, P.C.

By 
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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 1281—August Term, 1988

(Argued June 15, 1989 Decided October 10, 1989)

Docket No. 90-7267

AUTOMOBILE CLUB OF NEW YORK, INC., and
AAA CLUBS OF NEW JERSEY,

Appellants,

-- v. --

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, et al.,

Appellees.

B e f o r e :

OAKES, Chief Judge,
VAN GRAAFEILAND and PRATT, Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Milton Pollack, Judge, holding that, with the Port Authority Trans-Hudson Railroad, PATH, included in the rate base of the Port Authority's bridges and tunnels, the tolls on the bridge remained "just and reasonable," as required by 33 U.S.C. § 508 (Supp. V 1987).

Judgement affirmed. Judge Van Graafeiland dissenting in a separate opinion.

ANTHONY S. GENOVESE, Kissam & Halpin, New York, NY (Dennis J. Crossley, John D. D'Ercole, New York, NY, of counsel), for Appellants.

ARTHUR P. BERG, New York, NY (Joseph Lesser, Milton H. Pachter, Sholem Friedman, Carlene V. McIntyre, New York, NY, of counsel), for Appellees.

OAKES, Chief Judge:

The issue in this case is whether the Port Authority of New York and New Jersey may subsidize the operations of its Port Authority Trans-Hudson ("PATH") Railroad with revenues collected from tolls on its bridges and tunnels. The subsidy is achieved by including PATH in the rate base of the tolls that the Port Authority charges on its bridges and tunnels. The question is then whether the bridge tolls are "just and reasonable," as required by section 135(i) of the Federal-Aid Highway Act of 1987, 33 U.S.C. § 508 (Supp. V 1987).

The Automobile Club of New York and five AAA Clubs of New Jersey (the "Auto Clubs") sued the Port Authority after it raised its bridge and tunnel tolls (along with PATH fares) in 1987. The Auto clubs claimed that, with PATH in the rate base, the new bridge tolls were not just and reasonable. Judge Milton Pollack found that

the Port Authority's bridges, tunnels, bus terminal, bus programs and PATH form an "integrated, interdependent transportation system." Automobile Club v. Port Auth., 706 F.Supp. 264, 280 (S.D.N.Y. 1989). Accordingly, he decided, it is proper to include PATH in the rate base, from which it follows that the tolls are just and reasonable. Id. at 276-77. We agree and affirm the decision below.

BACKGROUND

New York and New Jersey created the Port Authority by interstate compact in 1921, N.Y. Unconsol. Law §§ 6401 et seq. (McKinney 1979),[1] with the consent of Congress, Act of Aug. 23, 1921, ch. 77, 42

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[1] New Jersey passed identical legislation. See N.J. Stat. Ann. §§ 32:1-1 et seq. (West 1963 & Supp. 1989). We shall follow the precedent established by Automobile Club v. Cox, 592 F.2d 658, 661 N.4 (2d Cir. 1979), and refer only to the New York legislation.

Stat. 174. The two states recognized that, with the development of commerce, the territory in and around the port of New York had become "commercially one center or district." N.Y. Unconsol. Law § 6401. In creating the Port Authority, they sought to achieve "better co-ordination of the terminal, transportation and other facilities of commerce in, about and through the port of New York." Id.

The Port Authority owns and operates a transportation network which provides river crossings linking southern New York and northern New Jersey. This network consists of four bridges, the George Washington Bridge (including a bus station), the Bayonne Bridge, the Goethals Bridge, and the Outerbridge Crossing; two tunnels, the Lincoln Tunnel and the Holland Tunnel; the bus terminal at 40th Street and 8th Avenue in Manhattan; the Port Authority Bus Programs; and the PATH railroad system.

PATH's lines run from Newark and Hoboken, New Jersey to various points in New York's central business district ("CBD," the area of Manhattan south of 59th Street).

The Port Authority's bridges, tunnels and bus terminal, taken together, operate at a profit. For example, in 1986 (before the toll increases at issue here), they produced $243.7 million in revenues and incurred $213.4 million in expenses (including depreciation), yielding $30.3 million in net income. In the same year, PATH lost $92.2 million ($49.0 million in revenues against $141.2 million in total expenses). Thus, the inclusion of PATH (along with $28.8 million in expenses attributable to the depreciation and amortization of the Port Authority's Bus Programs) resulted in a net operation loss that year of $90.7 million for the Port Authority's Interstate Transportation Network. Automobile Club, 706 F. Supp. at 283; Court Exhibit I, Exhibit F.

Tolls on the Port Authority's bridges must be "just and reasonable." This requirement originated in section 4 of the Bridge Act of 1906, 33 U.S.C. § 494 (1982). In 1987, Congress repealed the statutory provision that gave the Secretary of Transportation the power to prescribe "just and reasonable" tolls. Federal-Aid Highway Act of 1987, Pub. L. No. 100-17, § 135(a), 101 Stat. 134, 173 (the "Highway Act"). At the same time, Congress retained the requirement that tolls be "just and reasonable." Id. § 135(i), 101 Stat. at 174 (codified at 33 U.S.C. § 508 (Supp. V 1987)). The House Conference Report accompanying the Highway Act explained that the "just and reasonable" requirement

> is not intended to interfere with or in any way restrict existing authority granted to multi-modal transportation agencies, such as the Port Authority of New York and New Jersey, that operate bridges along with other facilities to use bridge toll revenues for non-bridge purposes or the pooling or combination

> of the revenues from all of their facilities.

H.R. Conf. Rep. No. 27, 100th Cong., 1st Sess. 175, reprinted in 1987 U.S. Code Cong. & Admin. News 66, 159.

In 1987, the Port Authority decided to engage in a $1.5 billion capital improvement program. Capital spending was necessary in order to maintain and modernize its interstate transportation network as use of its facilities increased rapidly. The Port Authority planned to spend $830 million to improve the PATH system, $495 million on Port Authority bridges, tunnels and bus terminals, and $150 million to establish a ferry service between Hoboken and lower Manhattan. The existing level of tolls and fares would be inadequate to operate the transportation network and to finance this capital program. Automobile Club, 706 F.Supp. at 281. The Port Authority therefore increased the tolls on its bridges

an tunnels, as well as the fares for travel on PATH. For example, non-discounted, eastbound -- no toll is charged for vehicles traveling west -- passenger car tolls on bridges and tunnels rose from $2.00 to $3.00, and the price of twenty commuter discount tickets to pay such tolls rose from $20.00 to $40.00. PATH fares, which are charged for travel in each direction, were increased from $.75 to $1.00. Id. at 267-68.

The Auto Clubs are non-profit organizations which promote the interests and welfare of motor vehicle users. They sued for a declaratory judgment that the 1987 increase in the Port Authority's bridge tolls violated the Highway Act's requirement that tolls be just and reasonable. See 33 U.S.C. §508 (Supp. V. 1987). They also alleged that the Port Authority's action violated 42 U.S.C. § 1983 (1982) and the Commerce Clause of the Constitution. The

Auto Clubs claim that PATH should not be included in the rate base of the Port Authority's bridges and tunnels because PATH is unrelated to the other river crossings and because its fares remain too low, even after the 1987 increase. They then assert that, if PATH is excluded from the rate base, the Port Authority's rate of return on its unamortized investment in use is excessive. The Auto Clubs do concede, however, that the rate of return is reasonable if the replacement cost method of accounting is used. In addition, they accept that the rate of return is reasonable, regardless of the method of accounting used, if PATH is properly included in the rate base. Automobile Club, 706 F.Supp. at 268-29 & N.3. Thus, the principal issue in their lawsuit was the propriety of including PATH in the rate base.

Most of the relevant facts were stipulated by the parties; Judge Pollack received the evidence and heard testimony from witnesses during a two-day bench trial. In his decision, he observed that the legislative histories of the Bridge Act and the highway At shed little light on the "just and reasonable" requirement. The 1987 conference Report did, however, indicate sufficient "flexibility" to permit the Port Authority to include facilities other than bridges, tunnels and terminals in its rate base. Id. at 273.

Judge Pollack also carvassed the case law. He found that City of Burlington v. Turner, 336 F.Supp. 594 (S.D. Iowa 1972), modified and aff'd, 471 F.2d 120 (8th Cir. 1973), simply established that the "just and reasonable" rule must include a reasonable return on the investment of capital. Automobile Club, 706 F.Supp. at 273 n.9. The case of Clarksburg-Columbus Short Route

Bridge Co. v. Woodring, 89 F.2d 788 (D.C. Cir.), remanded for dismissal as moot, 302 U.S. 658 (1937), had greater relevance: it involved two competing bridges. The Secretary of War (exercising the power later entrusted to the Secretary of Transportation) ordered the tolls on one bridge lowered. The court held that the Secretary erred in considering only the bridge owner's return on his investment. Competitive factors should also be considered, as in I.C.C. rate-making. The other bridge might be driven out of business by the reduced tolls; therefore, the owner of that bridge had a right to be heard before the tolls were lowered. 89 F.2d at 793-94. Clarksburg-Columbus thus "established the principal that a toll producing a seemingly unreasonably high rate of return may in fact be reasonable if its rate base does not include other facilities which are related to the facility in question." Automobile

Club, 706 F.Supp. at 273. In this case, we are concerned with different facilities that are owned and operated by one entity, the Port Authority. The principle in Clarksburg-Columbus would, mutatis mutandis, support the inclusion of those facilities in a single rate base if they are related to each other.

Finally, there was Automobile Club v. Cox, 592 F.2d 658 (2d Cir. 1979), a prior incarnation of the present case. In Cox, the Auto clubs contested the decision of the Federal Highway Administrator to approve increases in the Port Authority's bridge tolls that went into effect in 1975. The Auto Clubs adopted an "all or nothing" strategy in the lawsuit: They resisted the inclusion of any other river crossing facility -- i.e., not just PATH but the tunnels and the bus terminal, as well -- in the rate base of the four bridges. The underlying factual issue thus was whether

PATH was sufficiently related to the Port Authority's bridges to justify subsidizing PATH was sufficiently related to the Port Authority's bridges to justify subsidizing PATH with revenues from bridge tolls. The court reviewed that action under the "arbitrary [and] capricious" standard of 5 U.S.C. § 706(2)(A), since the administrative approval of toll rates for the future constitutes rulemaking. Id. at 664. Writing for a unanimous panel of this court, Judge Henry J. Friendly sustained the action of the Administrator because it was not arbitrary or capricious. Id. at 673.

Judge Pollack looked beyond this "sparse" case law construing the Highway Act's "just and reasonable" requirement, Automobile Club, 706 F. Supp. at 273, to consider public utility ratemaking cases where the same requirement is applied to gas and electricity rates, id. at 274. In those cases, courts apply the "used and useful"

principle to decide whether different facilities may be included in one rate base. Id. at 274-75 (quoting Tennessee Gas Pipeline Co. v. FERC, 606 F.2d 1094, 1109 (D.C. Cir. 1979), cert. denied, 445 U.S. 920, 447 U.S. 922 (1980); see also Smyth v. Ames, 169 U.S. 466, 546 (1898). In reviewing utility rates, courts take into consideration the cost of efforts to improve the quality and quantity of service "systemwide." E.g., Natural Gas Pipeline Co. v. FERC, 765 F.2d 1155, 1164 (D.C. Cir. 1985), cert. denied, 474 U.S. 1056 (1986).

The utility ratemaking cases "suggest by analogy" that "Port Authority activities which represent efforts to improve the quality and quantity of its services systemwide . . . may be included in the Port Authority's rate base." Automobile Club, 706 F.Supp. at 276. Judge Pollack also concluded that a "systemwide" approach to this case precludes the use of a narrow

"origin and destination" analysis to decide whether all of the Port Authority facilities at issue are sufficiently related to each other to justify including them in the same rate base. Id.

Applying these principles, Judge Pollack held that it was proper to include PATH in the same rate base with the Port Authority's bridges and tunnels: There is a "spillover" effect by which an interruption of service on PATH would disrupt the flow of traffic on the bridges and tunnels. The existence and smooth functioning of PATH therefore benefits those other facilities, and they would suffer serious congestion if PATH ceased to exist. The "spillover" effect means that PATH is "related" to the bridges and tunnels, notwithstanding the absence of a substantial "origin and destination" relationship between PATH and some of the bridges. See id. at 269-70, 276. Judge Pollack also found that users of

Another component of a functional relationship, the Port Authority argues, is the "spillover" effect.

According to the Port Authority, each of its river crossing facilities will suffer if any one of them is eliminated; this results from the "spillover" (or "domino") effect. The reason for this is that use of the river crossings is now close to capacity during peak morning hours. The Port Authority does not claim that, without PATH, significant numbers of PATH riders would travel as far afield as the Outerbridge Crossing. Clearly, the Holland and Lincoln tunnels are the most direct alternatives to PATH. However, nearly 70,000 passengers use PATH during the peak morning hours. If they were to use the tunnels instead, the tunnels would become overcrowded. Congestion in the tunnels would lead many travelers (including some who normally use PATH) to use the George Washington Bridge. Others (for

PATH pay their fair share of the expenses of crossing the Hudson River. Id. at 277. Thus, with PATH properly included in the rate base, the Port Authority's bridge and tunnel tolls were held to be just and reasonable. Id.[2]

DISCUSSION

The standard of our review is a threshold issue. Appellants of course urge plenary review of the decision below; appellee points out that the district court's legal conclusions rest upon factual findings that must be accepted unless they are clearly erroneous.

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[2] The district court also rejected the Auto Clubs' Commerce Clause and section 1983 claims. Automobile Club, 706 F.Supp. at 277. The Auto Clubs have not pursued those claims on appeal.

We should note also that the Port Authority's affirmative defense based upon the Eleventh Amendment, see id. at 271-72, is now foreclosed by our decision in Feeney v. Port Auth. Trans-Hudson Corp., 873 F.2d 628 (2d Cir. 1989)

Judge Pollack based his decision upon several legal conclusions. For example, he decided that it was not necessary to use a narrow "origin and destination" analysis to show that PATH is related to the Port Authority's bridges and tunnels; the "spillover" effect could also show the requisite relationship. He then applied that rule to the facts of this case and concluded that PATH is properly included in the rate base with the bridges and tunnels. It followed from that conclusion that the tolls are "just and reasonable," as required by the Highway Act.[3] These legal conclusions are subject to plenary review in this court. See Karavos Compania Naviera S.A. v. Atlantica Export Corp., 588 F.2d 1, 8 (2d Cir. 1978) (application of a legal

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[3] The Port Authority is prepared to argue that the tolls are just and reasonable even without including PATH in the rate base. Our decision here makes it unnecessary to reach that question.

standard is not a question of fact within Fed. R. Civ. P. 52(a)).

Judge Pollack's legal conclusions rested upon numerous findings of fact which, under Fed. R. Civ. P. 52(a), we must accept unless they are clearly erroneous. Among the most important of those findings was the fact that closing one of the Port Authority's facilities, for example PATH, would increase congestion on the others -- the "spillover" effect. Automobile Club, 706 F.Supp. at 279-80. This contributed to his factual finding that the Port Authority's bridges, tunnels, bus terminal, bus programs and PATH form "an integrated interdependent transportation system." Id. at 280.

Thus, our standard of review depends upon what we are reviewing. It is a factual finding, subject to Rule 52(a)'s "clearly erroneous" requirement, to decide whether a "spillover" effect exists. It is then a

legal conclusion, subject to plenary review, to decide what relevance any "spillover" effect might have -- i.e., whether it shows that PATH is related to the bridges and tunnels. Cf. Patel v. Wargo, 803 F.2d 632, 634 (11th Cir. 1986) (whether company was an employer under Fair Labor Standards Act was a legal determination, but "individual findings of fact which led to that legal determination must be examined under the clearly erroneous standard").

The dispositive issue in this case is whether there is a close relationship between PATH and the Port Authority's bridges and tunnels. Both sides agree that PATH must be "related" to the bridges and tunnels if it is to be included in their rate base. They disagree over how to define what they refer to as a "functional relationship" between river crossings, how to identify a functional relationship and how to measure it.

The Auto Clubs contend that the relationship must be "direct and significant" and that this can only be shown by "origin and destination" analysis. A functional relationship based upon "origin and destination" analysis means that one river crossing substitutes relatively easily for another. If a larger percentage of the people traveling between A in New Jersey and B in New York freely choose to use either river crossing X or river crossing Y, then X and Y have a functional relationship that the Auto Clubs consider direct and significant. Using this "origin and destination" analysis, the Auto clubs concede that there is a relationship between PATH and the Holland and Lincoln tunnels, but argue that PATH has only "some small" functional relationship with the George Washington Bridge and practically no

functional relationship with the three Staten Island bridges.[4]

The Port Authority acknowledges the importance of "origin and destination" analysis. It carries out "origin and destination" studies of its own and relies upon them for its planning. The Port Authority does not claim that "origin and destination" analysis would show that PATH is related to all of the other river crossings. However, it insists that "origin and destination" analysis alone is too narrow for the complete description or measurement of a "functional relationship."

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[4] The Auto Clubs buttress their argument by asserting that Cox requires a narrow "origin and destination" approach to this issue. We do not think that Cox requires such a restrictive definition of a functional relationship. Judge Friendly did analyze the relationships between river crossings in terms of travelers' origins and destinations, but his opinion did not consider whether a functional relationship must always be shown by such data. See Cox, 592 F.2d at 669-72.

example, those whose destination is Long Island, rather than the CBD) could shift to the Staten Island bridges. Indeed, there is even a significant "origin and destination" relationship between the George Washington Bridge and the Outerbridge Crossing: The former serves as a northern bypass of the CBD, while the latter is a southern bypass. If, then, the George Washington Bridge is congested, some people traveling between New Jersey and Long Island will choose instead to use the Outerbridge Crossing. Congestion on one Staten Island bridge will divert traffic to the other Staten Island bridges. Thus, PATH benefits the entire interstate transportation network because the effects of eliminating PATH would extend all the way north to the George Washington Bridge and south to each of the Staten Island bridges. In short, concludes the Port Authority, the "spillover" effect demonstrates that there

is a functional relationship between PATH and the other river crossings.

We agree with the position taken by the Port Authority and accept by the district court. Measuring the relationship between river crossings by means of "origin and destination" data is useful but not sufficient. This approach is fine when all lanes are open and traffic flows smoothly, but it does not adequately describe what happens when traffic is disrupted. It fails to take into account the full extent of the Port Authority's responsibilities. As anyone who has ever sat in a line of traffic or a railroad station for a length of time is aware, the Port Authority's employees cannot think only in terms of traffic flowing smoothly and trains running on time; they must also anticipate and respond to disruptions and delays. The Port Authority is entitled to prove that PATH is related to the bridges and tunnels with evidence that

a "spillover" effect links even those river crossings that travelers do not normally use interchangeably. A functional relationship exists, then, among those facilities that contribute to the Port Authority's performance of its duty efficiently to provide transportation to travelers over and under the waterways between southern New York and northern New Jersey. See Automobile Club, 706 F.Supp. at 276.[5] Thus, Judge Pollack was correct in following the analogy of the utility ratemaking cases and in deciding not to measure PATH's relationship to the other river crossings narrowly in terms of "origin and

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[5] In response to an argument made by the Auto Clubs, it is immaterial that our broad definition of "functional relationship" might extend to other facilities outside the Port Authority's domain -- for example, the Tappan Zee Bridge. The Port Authority does not own or operate them, so they are not candidates for inclusion in its rate base.

destination" data alone. We agree that, as a matter of law, the "spillover" effect should also be considered.

Judge Pollack found that direct relationships exist between different river crossings facilities -- for example, between PATH and the two tunnels, and between the Holland Tunnel and the Staten Island Bridges. He found that closing one or more of those facilities increases congestion in the others -- the "spillover" effect. Evidence also established that it was most efficient and cost-effective to operate the Port Authority's interstate transportation facilities as an integrated system. These and other factual findings formed the basis for Judge Pollack's finding that the Port Authority's bridges, tunnels, bus terminal, bus programs and PATH constitute an "integrated, interdependent transportation system." See Automobile Club, 706 F. Supp. at 279-80.

Our review of the record convinces us that these factual findings are not clearly erroneous; indeed, it requires us to agree with Judge Pollack's findings. The evidence of increased use of the Port Authority's facilities is particularly significant. The number of passengers traveling east via those facilities by auto, bus and rail during the morning peak period (7:00-10:00 a.m.) has increased since 1967 as follows:

	1967	1977	1980	1987
Automobile	55,200	66,900	69,000	78,500
Bus	75,100	63,400	69,500	81,500
PATH	43,700	48,200	50,800	69,400

Id. at 267; Defendants' Exhibit F. The evidence in this case indicates that the Port Authority's facilities now operate at the limit of their capacity during peak periods. If PATH did not exist, the influx of nearly 70,000 passengers during each morning peak period would severely disrupt

traffic on the bridges and tunnels, even with the additional carpooling that would inevitably occur. If PATH had to be replaced, it would annually cost more to do so than the current subsidy. Id. at 280. PATH thus benefits those who normally use the Port Authority's bridges and tunnels. These facts lead us to agree with the legal conclusion that there is a functional relationship between PATH and those bridges and tunnels; this justifies including PATH in the rate base.

This conclusion is consistent with the result in Cox. However, one need only read Judge Friendly's opinion to recognize that we must, to a certain extent, distinguish Cox in order to justify today's decision in favor of the Port Authority.

Cox offered hope to both sides in this case. It did, of course, sustain a fare and toll structure that subsidized PATH. On the other hand, Judge Friendly wrote with

palpable reluctance. The inclusion of PATH in the rate base was a "giant leap" from anything previously acceptable under the "just and reasonable" requirement. Cox, 592 F.2d at 672. He suggested that the deferential "arbitrary or capricious" standard of review required the result. He noted that the Auto Clubs' "all or nothing" strategy of seeking to limit the rate base to the four bridges was flawed, and he invited them to submit a "new protest." Id. at 673. Consequently, the Port Authority handles Cox gingerly; it strives to distinguish the case that it won a decade ago. By the same token, the Auto Clubs embrace Cox, confident that it now dictates a contrary result, especially since they have abandoned their previous "all or nothing" strategy.

The Auto Clubs make much of Judge Friendly's concern about taking the "giant leap" of including PATH in the rate base.

However, as Judge Pollack pointed out, the Cox court did, in fact, take that leap; and the real issue is whether the leap is proper, not how long it is.

We find it easier to sustain the Port Authority's position today than the panel did ten years ago. What was a difficult leap for one of the giants of our jurisprudence has become a comfortable step for us -- not because we presume to match Judge Friendly's stride, but because the situation in 1989 differs from that of the mid-1970s. There is now considerably more evidence in the record to show that PATH is related to the other river crossing facilities. See generally Automobile Club, 706 F.Supp. at 266-71, 278-83. The use of the Port Authority's facilities has greatly increased since the record in Cox was established, in part because of New York's and New Jersey's economic growth in the early 1980s. Evidence before the Cox court

showed that 174,800 people used the Port Authority's facilities to travel east across the Hudson during the morning peak period. (An additional 13,500 used Conrail to cross the Hudson.) Cox, 592 F.2d at 671. In 1987, 229,400 passengers used Port Authority facilities to travel east each morning peak period, with an additional 24,000 using other rail services into Penn Station. Automobile Club, 706 F. Supp. at 267. The Auto Clubs have not refuted the Port Authority's evidence that its river crossing facilities are now strained to their limits during those peak periods. (We suspect that Auto Club members who commute between New Jersey and New York are ruefully aware of this situation.) The lack of spare capacity during peak periods means that the "spillover" effect must be considered when assessing relationships between the Port Authority's river crossings.

The Auto Clubs point out that the interstate transportation network did not break down completely when service on PATH was interrupted by lengthy strikes in 1973 and 1980. This is evidence, they say, that refutes the Port Authority's claims about the "spillover" effect. We disagree. What happened in 1980 during a temporary interruption of service tells us little about what would happen now if PATH were to disappear permanently. The number of people using the Port Authority's river crossings during morning peak hours increased by 22% between 1980 and 1987. See supra at 6049. The Auto Clubs' argument does not take into consideration the current absence of spare capacity on the bridges and tunnels to absorb displaced PATH riders. In addition, testimony at trial showed that the Port Authority made special arrangements to alleviate the congestion caused by the 1980 strike, and commuters adjusted their

schedules to avoid traffic jams on the bridges and tunnels. Some of these stopgap measures would be more difficult to take now, and few of them would be feasible over the long run if PATH ceased to exist.

In Cox, Judge Friendly looked askance at PATH's fares, which had not been increased in 1975 when the bridge and tunnel tolls were raised. See Cox, 592 F.2d at 672 (30 cent fare is "prima facie unreasonably low"). The Auto Clubs pursue that point, decrying the Port Authority's failure to conduct a "formal study" before raising PATH's fares in 1987 and arguing that PATH users do not pay their fair share of the cost of traveling across the Hudson.

PATH fares have been increased three times since this court's decision in Cox. See Automobile Club, 706 F. Supp. at 281. The most recent increase -- from $.75 to $1.00 -- coincided with the toll increases at issue in this case. PATH fares are now

quite comparable to bridge and tunnels tolls. Indeed, it could be argued that it is now the motorists who get a better deal. A round-trip on PATH costs $2.00, exactly the cost of a round-trip on the bridges and tunnels using a commuter discount ticket. And, of course, the cost of a bridge or tunnel toll can be shares among all of the riders in a car, whereas each PATH rider must pay his or her full fare.

The Auto Clubs nevertheless suggest that the Port Authority could and should have pushed PATH fares even higher. Again, we disagree. The Port Authority considered the appropriate factors when it set the new fares in 1987 -- for example, the amount of money that the increases would bring in, comparable fares on New York's subways, the convenience of collecting the fares, and acceptance of the new fares among passengers. See Automobile Club, 706 F. Supp. at 268, 276-77. It was not necessary

for the Port Authority to conduct a more formal study or to test the market's elasticity by pushing PATH fares further upward. In short, PATH's fares are no longer "prima facie unreasonably low"; PATH's riders are paying their fair share of the cost of their transportation across the Hudson.

Judge Friendly contemplated the possibility that Congress might "remove or alter the points in controversy." Cox, 592 F.2d at 673. This has not occurred. However, the House Conference Report accompanying the 1987 Highway Act recognized that the Port Authority has authority "to use bridge toll revenues for non-bridge purposes." H.R. Conf. Rep. No. 27, 100th Cong., 1st Sess. 175, reprinted in 1987 Code Cong. & Admin. News 159. We agree with Judge Pollack that this gives the Port Authority some flexibility which could extend to including PATH in the rate base

with the bridges and tunnels. See Automobile Club, 706 F. Supp. at 273.

To summarize on this point, we recognize that Cox alone does not provide strong support for holding that the Port Authority's 1987 tolls are just and reasonable. However the Auto Clubs are mistaken in arguing that there is some rule buried in Cox that requires a different result this time. This case has indeed changed during the past ten years, but in the opposite direction; the facts in the record now make it easier for us to conclude that PATH should be included in the rate base.

CONCLUSION

PATH, then, is related to the Port Authority's bridges and tunnels. It is proper to include PATH in their rate base, and the tolls are just and reasonable.

Judgment affirmed. Judge Van Graafeiland dissenting in a separate opinion.

VAN GRAAFEILAND, Circuit Judge, dissenting:

Because cases decided by this Court often return to us like the proverbial bad penny, we have established the practice, whenever feasible, of assigning the returned case to a panel which includes at least one member of the original panel. This sensible practice insures that at least one member of the second panel will be personally familiar with the issues and arguments presented to the first and with the reasoning that led to the original holding. Eleven years ago, I sat on a panel with two of the strongest members of this Court, Judges Friendly and Timbers. We listened to the identical arguments that the Port Authority made to the present panel, and we rejected them.

Principal among those arguments was PATH's alleged role in relieving congestion on all the bridges, including the Staten Island and George Washington Bridges. The Federal Highway Administrator, whose decision was being appealed, held that PATH was "used and useful" for the convenience of both passenger vehicles and trucks using the Staten Island and George Washington Bridges. Our response to these statements was as follows:

> The question was not whether PATH requires a subsidization but whether, in the absence of Congressional action such as the 1952 legislation concerning DRPA, the huge deficits of PATH can properly be loaded onto users of the PA bridges -- three of which have almost no functional relationship and the fourth, the George Washington Bridge, only a small one. There was no showing that it was the level of the previous tolls rather than the convenience of the bridges and tunnels that was drawing traffic away from PATH or that the higher ones would increase PATH ridership. The higher bridge tolls are paid not simply by commuters who opt to use the George Washington Bridge when they could as readily have used PATH but by commuters for whom PATH was not a feasible alternative, by non-commuter passengers including many

> who were not destined to or did not originate in Manhattan or nearby New Jersey, and even by trucks.

592 F.2d at 672.

The Federal Highway Administrator had no problem thereafter in interpreting correctly our 1979 decision:

> The Circuit Court's criticism of the Administrator's prior decision in 1976 including PATH in the rate base is well taken . . . . If the Port Authority were allowed a revenue requirement based on its total activities or on its total surface transportation facilities, it would be free to invest in deficit operations secure in the knowledge that they could charge the bridge users for support of such activities. A finding along those lines would be contrary to the statutory duty to protect the bridge users' interests and would be an abdication of statutory responsibilities.
>
> . . .
>
> As a matter of law, the rate base for the bridge tolls is limited to the four bridges, two tunnels, and the bus terminal.

Investigation Report and Recommendations, F.H.W.A. Dkt. No. 841-T, 15-16, 18 (June 14, 1985), adopted and incorporated by

reference, Order of the Federal Highway Administrator, F.H.W.A. Dkt. No. 841-T, 2 (June 19, 1985).

I respectfully disagree with my present colleagues' attempts to distinguish our 1979 decision. Although I do not profess to have greater legal acumen than they, I have something that they lack -- firsthand knowledge of what transpired on the prior appeal. With the benefit of this background, I am convinced that there is no material difference between the 1979 case and the instant case. In short, the instant appeal is a classic example of deja vu. Accordingly, because I am unable to reconcile my colleagues' present holding with our 1979 decision, I dissent. However, I want to make it clear that, even if I were approaching this matter de novo, I would conclude, as I did before, that it is manifestly unfair and improper to saddle

captive bridge users with the enormous deficits of PATH.

One need glace only briefly at a map of the United States to see that New York City is the gateway to all of Long Island and southern New England for interstate vehicular traffic from the west and south. The Port Authority, a statutory monopoly, N.Y. Unconsol. Laws § 6513 (McKinney 1979), holds the key to the gate. This means that a motorist taking the most direct route from a city such as Pittsburgh, Pennsylvania to New Haven, Connecticut must pay the Port Authority a fee for the use of that key; so also must a motorist going from a city such as Washington, D.C. to Riverhead, Long Island. The most convenient passageways through the gate for such motorists would be the George Washington Bridge and the Staten Island bridges.

The Port Authority itself describes the George Washington Bridge as a "key link in

the northern metropolitan bypass system" which provides connections between Route 80, the main interstate highway across New Jersey, and the New York thruway, "as well as other regional highway systems in each state." Upon closer observation, the aforesaid map would show also that Yonkers, White Plains, Mount Vernon, New Rochelle, and numerous other population enclaves all are located immediately north of the George Washington bridge, which serves as their interstate gateway to and from the south and west. While approximately fifty million vehicles cross the George Washington bridge in an easterly direction each year, it is undisputed that the bulk of this traffic is not headed for the central business district of Manhattan, which is the district served by PATH.

My colleagues belittle this undisputed "origin and destination" evidence concerning the bridge traffic and emphasize the so-

called "spillover" or "domino" effect that they say would result if PATH were eliminated. Apparently, my colleagues believe that this "spillover" effect was not considered by the prior panel. If this is what they believe, they are in error:

> The PA witness stated that, because of its location, the George Washington Bridge traffic is "predominately peripheral" (Ex. PA 7, p. 25); shutting down PATH thus would affect it in the first instance less than the tunnels; it is the overcrowding of the latter that might congest the Bridge.

592 F.2d at 672.

The prior panel was well aware of the off-bridge traffic problems that a motorist would encounter should he or she decide to participate in a "spillover" from the two tunnels to the George Washington Bridge. It is approximately ten, heavily-traveled miles from the west end of the Lincoln Tunnel to the George Washington Bridge if the motorist elects to go by way of the tolled New Jersey Turnpike. It is approximately eight equally-

crowded miles if the motorist proceeds along secondary roads. From the Holland Tunnel to the George Washington Bridge, the distance via the Turnpike is approximately thirteen miles, and, via secondary roads, approximately eleven miles. From the east end of the George Washington Bridge, the distance along the most direct city streets to the east end of the Lincoln Tunnel is approximately seven miles; via the FDR Drive, it is approximately ten miles. From the east end of the Bridge to the east end of the Holland Tunnel, a motorist traversing city streets will drive about ten miles before reaching the Holland Tunnel. If the motorist proceeds by way of the FDR Drive, he or she will travel about thirteen miles.

I was prepared in 1979 to take judicial notice of the fact that travel conditions on the FDR Drive during morning and evening rush hours are extremely bad, and I continue to be so prepared. In my opinion, few, if

any, intelligent motorists headed for the central business district of Manhattan will drop out of line at either the Holland or Lincoln Tunnels during the morning rush hours, detour some fifteen to twenty miles to cross the George Washington Bridge and join the morning traffic from the Triborough Bridge crawling south on the FDR Drive. Travel along the east bank of the Hudson River would be no better than on the FDR Drive, as witness the recent much-litigated, but unsuccessful, effort to construct the "Westway." See Sierra Club v. United States Army Corps of Engineers, 776 F.2d 383, 386 (2d Cir. 1985), cert. denied, 475 U.S. 1084 (1986).

The relationship between the Staten Island bridges and PATH is equally remote. A survey by the Port Authority of the traffic patterns on these bridges states that they form "the southern route. . .

around the congested Manhattan Central Business District" and concludes:

> [U]nlike the facilities which feed the Manhattan Central Business District, transit plays virtually no role in this market.

Port Authority of New York and New Jersey, Staten Island Bridges Study 4, 9 (1987).

I am unpersuaded by my colleagues' "spillover" argument that travelers whose destination is Long Island rather than the central business district of Manhattan might shift from the tunnels to the Staten Island bridges. This argument assumes that a substantial number of motorists using the two tunnels during rush hours are headed for Long Island rather than the central business district, an assumption without support in the record and equally unsupportable as a practical proposition.

Treatment of the Port Authority's bridges, tunnels, bus terminal, bus programs and PATH as "an integrated interdependent

transportation system", takes no cognizance of the fact that there are several other transit systems available for use by New Jersey residents, the New Jersey Transit and Amtrak trains running from Newark to the Pennsylvania Station and the New Jersey Transit trains running from Newark to Hoboken. It also overlooks the fact that there are trans-Hudson ferries, and that, when the district court's opinion was written, two new ferries were scheduled to begin operations in the then near future, and are now operating. The argument that the closure of PATH will force all commuters to transfer to the tunnels and bridges just doesn't wash.

My final observation on the "spillover" effect is that it hypothesizes a crisis that in fact does not exist, a crisis predicated on the erroneous proposition that the tolls paid by captive users of the bridges and tunnels are the only proper source of

additional funds for PATH's needs. I suggest that, before taking up the question how much the largely unaffected users of the George Washington Bridge and the Staten Island bridges can be expected to contribute to the operation of PATH, both the Port Authority and the courts should make a thorough and fair inquiry into whether PATH is contributing its fair share of the Port Authority's earnings, see The Minnesota Rate Cases, 230 U.S. 352, 434-35 (1913); Smyth v. Ames, 169 U.S. 466, 541 (1898), and how much the users of PATH should be expected to pay to accomplish this result. See Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

On several occasions, the Federal Highway Administrator, whose decision we reviewed in 1979, expressed a concern that bridge users should not be saddled with exorbitant tolls for the purpose of subsidizing the users of PATH:

> As the legislative history of the General Bridge Act makes clear, one

> guiding purpose of the statute was to prevent the operators of toll bridges from exploiting what was often a monopoly position to exact excessively high tolls from bridge users.

Decision of Federal Highway Administrator, F.H.W.A. Dkt. No. 76-9, 5 (August 9, 1977).

> In this regard, it should be repeated that while a fair rate of return is an important element of financial need in a bridge toll proceeding such as this, the burden of maintaining such a rate cannot be allowed to fall exclusively on users of the subject bridges.

Decision of Federal Highway Administrator, F.H.W.A. Dkt. No. 76-9, 12 (November 7, 1977). See also The Minnesota Rate Cases, supra, where the Court said that "the carrier cannot justify unreasonably high rates on domestic business because only in that way is it able to meet losses on its interstate business." 230 U.S. at 435.

The Administrator concluded:

> Because any future toll increase must be based upon by the Administrator, adequate safeguards exist to prevent discrimination against bridge users in favor of mass transportation users.

F.H.W.A. decision of November 7, 1977, supra, at 12.

When Congress transferred the exercise of these safeguards to the district courts, it surely anticipated that the courts would not approve the Authority's claim of reasonableness without receiving and passing upon facts and figures to support it. See Lincoln Gas & Electric Light Co. v. Lincoln, 223 U.S. 349, 361-65 (1912); Chicago, Milwaukee & St. Paul Ry. v. Tompkins, 176 U.S. 167, 179-80 (1900). I regret to say that I do not believe that has occurred in the instant case. I find nothing in the record that justifies PATH's fare of $1.00, a fare that pays about half the expense of running the railroad and has caused an increase in the PATH deficit from $34 million in 1977 to $87 million in 1987, and to a projected 1991 deficit of $133 million.

The district court correctly found that the Port Authority did not conduct any

formal studies on the effect of various PATH fare levels on PATH ridership. 706 F. Supp. at 277. Unlike my colleagues, I do not believe that this district court's finding that the "PATH Board 'knew' that every ten-cent increase in PATH fares produces about $6 million in revenues if ridership remains constant" indicates a thoughtful analysis of possible fare increases. Id. A third-grade student could multiply PATH's sixty million annual passenger figure by ten cents and come up with a figure of $6 million. The same student could determine even more quickly that, if ridership remained constant, an increase of $1.00 in PATH fares would produce $60 million in increased revenues. The decision-making process involved in fare increases does not follow such a simple course.

It is generally accepted that a substantial increase in the cost of public transportation will create what is known as

a "resistance factor." See Powell v. Washington Metropolitan Area Transit Comm'n, 485 F.2d 1080, 1083 n.17 (D.C. Cir. 1973). What a reviewing court needs to know, therefore, is what effect the resistance factor would have on any proposed fare increase. We know here that PATH fares have been increased on several occasions and its trains still are running at capacity. No facts, figures, or projections have been introduced into the record to indicate that PATH would not continue to operate at capacity if its fares were increased:

> Q. Did you or anyone under your direction prepare any study to determine what the loss in ridership would be under various permutations and combinations of the toll increase, assuming the toll increase was 25 cents to a dollar at that time, assuming it was 50 cents to a $1.25, assuming that it was 75 cents to a $1.50, did anyone prepare any studies as to what the expected ridership would be under the various permutations and combinations?
>
> A. Not to my knowledge.
>
> . . .

> Q. Did you make any study as to whether if you had increased the PATH fare to $1.50 you would lose any substantial amount of ridership?
>
> A. No study was made of that.

Testimony of John Haupert, Port Authority Treasurer, Joint Appendix at 265-67.

The reliance placed by the district court and my colleagues upon the "administrative convenience of charging 'round figures' for its tolls and fares" is mystifying to me. This "administrative convenience" argument was explained by Mr. Haupert as follows:

> On the PATH, what I was trying to point out to you was that we were going to a four quarter system, which meant that people would have to insert four quarters into the turnstiles. If we went to a five quarter system or a six quarter system it would slow down the amount of people we could get through the turnstiles which would have been an added inconvenience on the passengers. We did reflect that in our thinking as to what would be the appropriate fare.

Joint Appendix at 263.

Undoubtedly, it would take a second or two longer for a passenger to deposit six

quarters in a slot than it would take to deposit four. However, to use this as a justification for increasing tolls on the George Washington Bridge some $50 million a year borders on the absurd. Whatever minimal delay might result from the insertion of two more quarters readily could be compensated for by installing an additional turnstile at each station.

If the Port Authority wishes to encourage the use of dollar bills, a fare of $1.50 would require only one bill and two quarters, and a fare of $2.00 would require only one additional bill. Such increases, which easily could be handled without material delay, would help to reduce the $87 million deficit which the Port Authority has placed on the backs of captive bridge motorists and truckers.

I am equally mystified by the district court's statement that PATH's tolls are in line with "other urban subway transit

systems", 706 F. Supp. at 277, a finding upon which my colleagues rely in holding that a comparison of fares with the New York City subways is an "appropriate factor." PATH is not an "urban subway transit system". It is an interstate "Railroad", formerly known as the Hudson and Manhattan Railroad Company and, like other railroads, it operates "trains". Neither the Port Authority nor the district court has pointed to any similarities between PATH and the New York subway system that justify such a comparison. The Port Authority's proof with regard to the New York subway system can be summed up on one sentence:

> Well, we looked at the New York City fare of one dollar and thought that a comparable fare on PATH would be readily acceptable."

Testimony of John Haupert, Joint Appendix at 262.

Admittedly, one of the most frequently used methods of testing the reasonableness

of a rate is to compare it with rates on similar traffic in adjacent territories. See Aluminum Co. of America v. I.C.C., 581 F.2d 1004, 1008 (D.C. Cir. 1978); Alldredge, Rate-Making for Common Carriers, 94 (1929); 13 C.J.S. Carriers § 297f at 678-80 (1939). However, comparisons of rates have little probative value unless the conditions of operation are essentially the same. Aluminum Co., supra, 581 F.2d at 1008; Chicago & Eastern Illinois Ry v. Commerce Comm'n, 343 Ill. 117, 125 (1931); 13 C.J.S., supra, at 679-80; 64 Am. Jur. 2d Public Utilities § 213 at 720 (1972). In contrast to the lack of similarity between PATH and the New York City subway system, there are a number of other commuter railroads serving New York City whose services are very similar to those furnished by PATH. I take judicial notice of both their existence and their published fares.

PATH is a commuter train that runs from Newark, a major New Jersey city, to downtown Manhattan. En route it passes through Harrison and Jersey City. It also has a separate New York feeder running from Journal Square in Jersey City to Hoboken, New Jersey and through it to Manhattan. New Jersey Transit and Amtrak also have lines running from Newark to Manhattan. The fare for this service on New Jersey Transit is $2.25, on Amtrak it is $5.75. New Jersey Transit trains also run from Newark to Hoboken. The are for this service is $1.75, to which must be added the cost of transportation across the Hudson River. The fare by New Jersey Transit bus from Newark to Manhattan is $2.95. From Hoboken to Manhattan, the bus fare is $1.70. From Newark Airport to Manhattan, it is $7.00. The fare from Newark to Manhattan by Greyhound bus in $7.00.

Several commuter trains are run by the Metro-North Commuter Railroad. Fares for comparable distances on those lines are as follows:

From Mount Vernon, Pelham and New Rochelle --

$4.50, off-peak $3.50.

From Woodlawn and Wakefield --

$4.00, off-peak $3.00.

From Marble Hill and Riverdale --

$4.00, off-peak $3.00.

Where the Long Island Railroad, the busiest commuter railroad of all, competes with the New York subways, its fares are of necessity competitive. However, once Long Island leaves the subway area, its fares escalate rapidly. For example, the fares from Valley stream, Garden City and Mineola are $5.00.

Although the territories covered by the several lines of New Jersey Transit that connect with PATH at the Penn Station in

Newark are not the same as that covered by PATH, a brief look at their fares for distances comparable to the distance between Newark and New York is enlightening. Thus, on the Raritan Valley Line, the fare from Garwood to Newark is $2.50. On the North Jersey Coast Line, the fare from Avenel to Newark is $3.00. On the Northeast Corridor Line, the fare from Rahway to Newark is $2.50. Several other New Jersey Transit Lines connect with PATH at Hcboken. On the Boonton Line, the fare from Glen Ridge to Hoboken is $2.50. On the Pascack Valley Line, the fare from Teterboro to Hoboken is $2.50.

Why is it that among all these commuter lines, PATH's fare of $1.00 stands alone? the answer is clear; the motorists and truckers using the bridges and tunnels are being forced to pay the difference. I cannot accept this as just and reasonable.

I believe that our review of the district court's decision should be no less demanding than that court's review of PATH's decision. We should not accept the district court's generalized conclusion that PATH's $1.00 fare is reasonable without being satisfied that it is supported by adequate underlying facts. Schneiderman v. United States, 320 U.S. 118, 129-31 (1943); Russo v. Central School Dist., 469 F.2d 623, 628-30 (2d Cir. 1972); Monarch Beverage Co. v. Tyfield Importers, Inc., 823 F.2d 1187, 1192 (7th Cir. 1987). Unlike my colleagues, I find such support totally lacking in the instant case.

The ultimate irony of my colleagues' opinion is its recital of the benefits allegedly flowing to motorists and truckers proceeding across the George Washington and Staten Island Bridges as a result of the $1.00 PATH tolls and the concomitant $3.00 bridge tolls. Over one and one-half million

users of these bridges are protesting these tolls, and they do not feel benefited. Indeed, their sentiments would find eloquent expression in the ancient proverb that a man can handle his enemies if someone will only protect him from his friends.

Although it plays no part in my decision, I cannot close this dissent without a reference to recently published reports that the Port Authority has adopted the practice of closing some of the toll booths on the George Washington Bridge because of insufficient budgeted funds. To the long-suffering users of the Bridge whose money is being used to subsidize PATH, this must be like having salt rubbed in their wounds.

I would hold, in accordance with our prior decision, that, until Congress authorizes the Port Authority to do otherwise, the Authority must limit the rate base for the George Washington and Staten

Island Bridge tolls to the bridges, the tunnels and the bus terminals.

Alternatively, I would remand to the district court with instructions to return the matter to the Port Authority for reconsideration of all the tools and the making of a reasonable and just allocation of fares and tolls, supported by complete and adequate factual findings.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At the stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of November one thousand nine hundred and eight-nine.

AUTOMOBILE CLUB OF NEW YORK, INC.,and AAA CLUBS OF NEW JERSEY,

Plaintiffs-Appellants,

-v-

DOCKET NUMBER

THE PORT AUTHORITY OF NEW NEW YORK AND NEW JERSEY, PHILIP D. KALTENBACHER, ROBERT F. WAGNER, RICHARD C. LEONE, JAMES G. HELLMUTH, HENRY F. HENDERSON, JR., WILLIAM K. HUTCHINSON, H. CARL McCALL, JOHN G. McGOLDRICK, WILLIAM J. RONAN, HOWARD SCHULMAN, ROBERT VAN BUREN, HAZEL FRANK GLUCK, as Commissioners of the Port Authority of New York and New Jersey,

89-7267

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Plaintiffs-Appellants, Automobile Club of New York, Inc. and AAA Clubs of New Jersey,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith

ELAINE B. GOLDSMITH
Clerk

FILED
Nov 21 1989
Clerk, U.S. Court of Appeals
Second Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AUTOMOBILE CLUB OF NEW YORK, INC. and AAA CLUBS OF NEW JERSEY,	:	
Plaintiffs,	:	
-v.-	:	87 Civ. 2419 (MP)
THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, et al.,	:	
Defendants.	:	

OPINION AND DECISION

APPEARANCES:

For Plaintiffs:

KISSAM & HALPIN
101 Park Avenue
N.Y, N.Y. 10178

By: Anthony S. Genovese

For Defendants:

JOSEPH LESSER
One World Trade Center
N.Y, N.Y.10048
By: Milton Pachter
Arthur P. Berg
Sholem Friedman

MILTON POLLACK, S.U.S.D.J.

Pollack, Senior District Judge

The central issue in this case is whether it is "just and reasonable" for the Port Authority to include its investment in and the mounting operating losses of the Port Authority Trans-Hudson (PATH) Railroad in the Port Authority's rate base for determining the tolls to be charged for passage over the bridges owned by the Port Authority between New York and New Jersey.

This is an action for declaratory judgment and injunctive relief.

Plaintiffs, Automobile Club of New York, Inc. and five member AAA Clubs of New Jersey ("the Auto Clubs"), sue for a declaratory judgment that the 1987 Port Authority increase in its bridge tolls violates section 135(i) of the Federal-Aid Highway Act of 1987 (the "Highway Act"), 33 U.S.C. § 508 (Supp. V. 1987), 42 U.S.C. §

1983 (1982), and the Commerce Clause of the federal Constitution. Plaintiffs seek imposition of a constructive trust on alleged excess charges collected by the Port Authority as a result of the increase, and for restitution thereof.

The Auto Clubs filed an Amended Complaint on October 7, 1988 adding twelve Port Authority Commissioners as defendants in response to the Port Authority's contention that the Agency enjoys immunity from suit in federal court under the Eleventh Amendment of the Constitution. Jurisdiction of the First, Second, and Fifth Claims for Relief is posited under 28 U.S.C. §§ 1331(a) and 22 01-02; jurisdiction of the Third and Fourth Claims for Relief is asserted under principles of pendent jurisdiction.

The action now before the Court is not unlike the one brought by the Auto Clubs in 1977 attacking a 1975 toll increase on the Authority's bridges, which resulted in denial by this Court of relief to the Auto Clubs. Automobile Club of New York, Inc. v. Cox, 444 F. Supp. 174 (S.D.N.Y. 1978) (Pollack, J.), aff'd, 592 F.2d 658 (2d Cir. 1979).

The witnesses were heard and the evidence was received in this case at a Bench Trial on November 28 and 29, 1988. Most of the facts were stipulated by the parties. At the close of the plaintiffs' case the Port Authority moved for a directed verdict dismissing the amended complaint for failure to establish a prima facie case. The Auto Clubs claimed that they had presented sufficient facts from which to draw an inference that the tolls were

unreasonable and unjust to users of the bridges. The Auto Clubs urged that the PATH operations should not form a part of the Port Authority rate base in the absence of statutory authorization therefor. However, they conceded that if PATH were included in the rate base the Port Authority's overall rate of return on its Interstate Transportation Network ("ITN") facilities would be "within the zone of reasonableness." The Court reserved decision on the motion to dismiss.

At the close of the entire case, the Port Authority renewed its motion for dismissal of the amended complaint, asserting that the Auto Clubs had completely failed to make out a prima facie case and had adduced no credible evidence why PATH should not be included in the Port Authority rate base. The Port Authority argued that

it had established by unrefuted testimony that PATH should be included in the toll base as an essential and integral part of the Port Authority's ITN. The Court again reserved decision.

For the reasons appearing hereafter, the Auto Clubs are not entitled to relief herein and the motions to dismiss the amended complaint and for judgment in favor of the defendants will be granted.

THE FACTUAL BACKGROUND

Plaintiffs, the Automobile Club of New York, Inc. and the AAA Clubs of New Jersey, are non-profit organizations organized with the intention of promoting the interest and welfare of motor vehicle users.

The Port Authority is an agency of the States of New York and New Jersey, created in 1921 by an interstate compact between them with the consent of Congress. 42 Stat.

174 (1921). Its principal purpose was to effectuate "a better coordination of the terminal, transportation and other facilities of commerce in, about and through the Port of New York." N.Y. Unconsol, Law § 6401 (McKinney 1979). The term "transportation facility" was in turn defined to include, inter alia, "railroads, steam or electric ... tunnels, bridges, boats, ferries ... and every kind of transportation facility now in use of hereafter designed for use for the transportation or carriage of persons or property." Id. at §6423.

Pursuant to its powers under the compact and amendments and supplements thereto, the Port Authority owns and/or operates in its Interstate Transportation Network, four interstate bridges (the George Washington Bridge, the Bayonne Bridge, the

Goethals Bridge, and the Outerbridge Crossing), two interstate tunnels (the Lincoln Tunnel and the Holland Tunnel), the PATH system, and the Port Authority Bus Programs.

The Port Authority's bridges, tunnels, terminals, PATH and Bus Programs are involved in the movement of people and freight across and under the interstate waters of the Port of New York District, which encompasses the area lying within a 25-mile radius of the Statue of Liberty.

The number of passengers travelling eastbound during a typical weekday peak period (7:00-10:00 a.m.) by auto, rail, and bus via Port Authority facilities over the interstate waters between New York and New Jersey has increased since 1967 as follows:

1967	1977	1987

Automobile	55,200	66,900	78,500
Bus	75,100	63,400	81,500
PATH*	43,700	48,200	69,400

*In 1987 24,000 passengers also travelled by other rail to Penn Station, New York

All four Port Authority bridges were constructed in accordance with the provisions of the General Bridge Act of 1906, 33 U.S.C § 494 (1982), which required that the tolls for transit over them be "just and reasonable." Until 1987, the Federal Highway Administrator ("the Administrator") determined whether such toll increases were in fact "just and reasonable." 49 C.F.R. § 1.48(i)(1).

On April 2, 1987, Congress enacted the Federal-Aid Highway Act of 1987, 33 U.S.C. § 508 (Supp. V. 1987) ("the Highway Act"). The Highway Act repealed the Administrator's authority to review Port Authority toll increases and also provided that:

> Tolls for passage or transit over any bridge constructed under the authority of the . . . Bridge Act of 1906 . . . shall be just and reasonable.

33 U.S.C. § 508 (Supp. V 1987).

Effective April 12, 1987, the Port Authority increased the non-discounted, eastbound passenger car tolls on its bridges and tunnels from $2.00 to $3.00. Bus tolls were increased from $2.00 to $3.00 and truck tolls rose from $1.50 per axle to $3.00 per axle. These tolls are charged only in the eastbound direction. In addition, the price of the Commuter Discount Ticket Book of 20 tickets increased from $20.00 to $40.00. PATH fares are charged for service in each direction (east or west), and were raised

from $.75 to $1.00 each way, or $2.00 a round-trip.[1]

The history of the April 1987 toll and fare increases was established without controversy as follows.

On November 24, 1986, the Port Authority's Executive Director submitted a report entitled "Capital Needs and Planning for the Port Authority Interstate Crosswater Facilities" ("the Port Authority Report") to the Port Authority's Commissioners. The report outlined the sharp growth in usage of the Port Authority's Interstate Transportation Network of cross-water facilities, the actions taken by the Port Authority to meet this growth, the magnitude of the need for rehabilitation and modernization of the

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[1] Prior to 1987, PATH fares had increased from $.30 to $.50 in 1983, and from $.50 to $.75 in 1984.

Port Authority ITN facilities and the inability of the system to provide sufficient revenues to cover the cost of the required capital improvements to the network.

The Port Authority Report projected that nearly $1.5 billion would have to be expended between 1987-1991 for capital improvements and additions to Port Authority facilities to continue the safe, reliable operation of the ITN and to meet projected demands for increased ridership. The Port Authority's plans were to add capacity through a PATH system capacity improvements program, a proposed implementation of a ferry service from Hoboken, New Jersey to Lower Manhattan and a possible expansion at the Staten Island Bridges.

The Port Authority Report also indicated that the ITN required substantial additional revenues to support the funding of these and other capital expenditures, since the ITN could not "generate" the required additional revenues under its then-existing current fare and toll structure. In fact, the report indicated that the network was generating insufficient revenues to cover its operating expenses, and that the gap between operating expenses and revenues was projected to widen significantly in the future.[2] The report made clear that the

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[2] In 1986 the Port Authority operated its bridges, tunnels, and terminals at an annual surplus of roughly $30 million (taking into account operating and maintenance expenses, allocated expenses, and depreciation). By contrast, when deficits from PATH and the Bus Programs are factored into the same equation, it results in an overall deficit of $90.7 million in 1986 for all Port Authority ITN facilities. The PATH

(continued...)

deteriorating service on PATH had led (and, no doubt, would continue to lead) to intolerable crowding on the vehicular crossings.

Four months after the Executive Director submitted that report, the Port Authority's Board of Commissioners adopted a resolution effective April 12, 1987, increasing the tolls which are under attack here and stating, among other things:

> it has become necessary for the Port Authority, as a self-supporting agency, to readjust the rates of toll charged for use of its bridges and tunnels. This adjustment is required to sustain the agency's ability to maintain and finance its facilities, especially its Interstate Transportation Network, and to retain its sound financial standing.

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[2](...continued)
deficits in particular have risen dramatically over the years: in 1977 the PATH deficit was at $34 million, in 1987 the deficit had run to $87 million, and it is projected that in 1991 the deficit will be $133 million.

In reaching this decision, the Port Authority Board also considered several significant objects of the toll increase: it sought to achieve a reasonable balance against competitive fares (especially inter- and intra-state fares); to increase revenue yields in order to limit the growth of the PATH operational deficits; to achieve operational simplicity in fare collection by establishing a round number for the tolls; and to minimize any negative effects upon the travelling public.

The trial testimony indicated that it is not feasible to charge a fare on PATH that would be equal to all of the costs associated with running PATH: fare box revenues for comparable transit systems typically produce about 50 percent of the direct expenses of running such systems, and the Port Authority Treasurer testified

that the $1.00 one-way PATH fare produced "that kind of relationship" for PATH. The testimony also showed that the expenses incurred by PATH in providing mass transit services to its passengers are reasonable and necessary and consistent with the Port Authority's duty to maintain tolls that are fair and reasonable. The Board considered these as well as the other factors mentioned above in setting its bridge and tunnel toll rates and its PATH fares; and that consideration stamps its action as a rounded, sound, and informed judgment.

The parties estimate that the 1987 toll increase will generate an additional $146 million in annualized revenues above the pre-1987 rates. The Auto Clubs contended but failed to establish that the bridge, tunnel and terminal surplus is already sufficient to pay for all bridge,

tunnel and terminal projects under the proposed $1.5 billion Capital Program without these additional revenues.

Importantly, the Auto Clubs conceded at trial that the rates of return from the 1987 tolls are "within the zone of reasonableness" if they include the PATH deficits in the rate base, and that even if PATH is excluded from the rate base, under the "replacement cost method" the resultant rates of return are also "within the zone of reasonableness."[3] The Auto Clubs,

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[3] There are essentially three methods for computing profits and rates of return on its facilities such as those in the Port Authority's ITN. The replacement cost method uses the current value of Port Authority facilities based on construction cost indices over time. By contrast, the gross investment method uses solely the original cost of facilities to calculate rates of return, and the unamortized investment in use method includes all depreciation and amortization of facilities in the equation. The replacement cost method tends to produce lower rates of return on investment

(continued...)

however, contended but failed to establish that PATH is not sufficiently related to the Port Authority bridges in order to justify the inclusion of any such PATH deficits in the rate base, and that without PATH the tolls are unreasonable and will generate revenues "well in excess of what is necessary to provide for the construction, operation, or maintenance of its bridges, tunnels and terminals."

Plaintiff's entire case is premised on the contention that while the "just and reasonable" provision of the Highway Act permits this Court to view the Port Authority's bridges, tunnels and bus terminal as one system in assessing the

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[3](...continued)
because it utilizes a higher cost of investment than the unamortized investment in use method, which subtracts from the cost of investment depreciation and amortization over time.

reasonableness of the Port Authority's bridge tolls, it does not permit the consideration of PATH as a bridge-related component of the Port Authority's ITN. In support of this proposition the Auto Clubs produced the Executive Vice-President and Treasurer for the Auto Club of New York, who gave as his opinion that the bridges, tunnels, and PATH do not constitute one integrated system, but rather two distinct systems: the Hudson River crossings (with some use of the George Washington Bridge associated with it) for those people whose destination is the Central Business District of Manhattan ("CBD"), and the Staten Island Bridge system, which functions as a bypass to the CBD.

The Auto Clubs acknowledged that "there is a relationship, concededly, between PATH and the tunnels, there is some

small relationship between PATH and the George Washington Bridge," but contended "there is practically no relationship between PATH and the Staten Island Bridges." Plaintiffs were unable to quantify, under their theory, what a fair inclusion in the rate base of the cost of operating PATH would amount to, though their counsel suggested that PATH should be included to "a minimal extent."

On the other hand, the Port Authority presented satisfactory evidence that the financial results and requirements of the PATH system are appropriate factors to be considered in assessing the reasonableness and justness of its bridge tolls, and that as a factual matter bridge users do benefit from investment in the related non-bridge ITN facilities such as PATH which form part of the integrated interdependent

transportation system to facilitate mass movements across and under interstate waterways.

The Port Authority has credibly demonstrated that PATH provides a very real and substantial benefit to the users of Port Authority bridges, and that without PATH the Port Authority's interstate transportation system would "break down completely."

The Port Authority has clearly established that the efficient and cost-effective functioning of its interstate transportation facilities requires their maintenance and operation as a single integrated, interdependent transportation system. All of the facilities, including PATH, are operating at full capacity during peak periods. The closing of one or more of the Port Authority's under- and cross-

water facilities thus results in a "spillover," or "domino," effect, increasing congestion in the others. The trial testimony showed that without PATH, the Holland and the Lincoln Tunnels become overtaxed, and if the tunnels become congested, the spillover traffic adds "significant loads" to the Staten Island Bridges and the George Washington Bridge. Similarly, improvements to one facility benefit the users of the others by reducing congestion on others, thereby making the entire network more efficient.

The evidence credibly demonstrated that the inclusions of Path's financial results in the rate base was both reasonable and necessary on at least two major grounds: first, were PATH to be eliminated, a replacement would be necessary to maintain the integrated

system, and second, a replacement would run the Port Authority into a larger expense than the PATH deficit. It was adequately established that it is cheaper to keep PATH in existence than to create a supplemental facility which would be needed were it not a part of the system. In short, it would be less expensive and less costly to continue to use PATH than to pay over an estimated $2 billion, not including land acquisition costs, for constructing a "PATH substitute," such as adding buses and another tube at the Holland and Lincoln tunnels.

The Treasurer of the Port Authority testified that without the toll and fare increases, it would have been impossible to fund projected operating deficits of the network and its $1.5 billion capital program. He pointed out that in the year

prior to the 1987 increase, the rate of return based on the most conservative method of computing rates of return on Port Authority's ITN facilities, the unamortized investment in use method, was negative if PATH were included in the rate base.[4] Moreover, even without PATH, the rate of return using the same method was only 4.9%. The witness testified that the Port Authority's non-ITN facilities would have been inadequate to take care of the Network's operating deficits and capital program without the 1987 toll increase.

It is undisputed that without the toll and fare increase, the Port Authority would have been precluded from issuing new consolidated bonds by the year 1990 because it could not have met the Port Authority's

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[4] See footnote 3, supra.

bond indenture coverage requirement. This requirement mandates that net revenues of a prior twelve-month period preceding the issuance of the new bonds must be covered by 1.3 times the debt service on all of the outstanding bonds in the future calendar year in which such debt service is at a maximum.

Dr. Matityahu Marcus, a Professor of Economics at Rutgers University and a recognized expert in rate proceedings, testified that the tolls at issue are, from several perspectives, "reasonable and just" under several different formulations of that standard. He then elaborated on the basis for his eventual conclusion that "it makes no economic sense" to exclude PATH from the base on which to establish reasonable and just tolls for the bridges in the Port Authority network:

Fundamentally, a rate base is an economic concept, and facilities that are used in the production of the particular service, the investment in those facilities should be treated as one rate base and should be included in the rate base.

In this particular case the service that we are talking about is river crossings. There is no question, I think, in my mind and based on what I have read, that a crossing that is being made by using one particular facility, say a tunnel, the service quality of this crossing is directly dependent upon there being other facilities that other commuters or other drivers are using.

So, in effect, the service that one obtains by using one facility is produced jointly by there being a number of other crossings. So from an economic point of view you are really talking about all these facilities being combined to provide a generic service, crossing of a particular river.

I would say this is not uncommon in economics. When we talk about electric utility regulation it is not unusual to have several different plants producing electricity at different costs, yet from the point of view at single cost per

> kilowatt-hour because for all intents and purposes the product in that case is being produced jointly, even though some of the plants are separated locationally, and I think this is a situation were we talk about the river crossing in this particular case.

Dr. Marcus's testimony thus indicates that from an economic perspective it is necessary and appropriate to include in the investment rate base all the elements of the Port Authority's Interstate Transportation Network, including PATH.

In addition to their assertion that PATH may properly be included in the Port Authority rate base under the federal Highway Act, the defendants asserted several affirmative defenses to the Auto Clubs' amended complaint: (1) that the Auto Clubs lack standing to bring suit and failed to serve a timely notice of claim under the Port Authority's suability

statutes, N.Y. Unconsol. L § 7101-12 (McKinney 1979) and N.J.S.A. 32:1-157 to -174 (West 1963) (providing that only the Attorney General of New York or New Jersey may bring such actions against the Port Authority, and that he must do so by serving a notice of claim on the Port Authority 60 days before suit is commenced); and (2) that the Court lacks subject matter jurisdiction over the Auto Clubs' claims against the Port Authority under the Eleventh Amendment.

DISCUSSION

The Port Authority's first affirmative defense may be disposed of summarily. First, the Auto Clubs have standing to challenge the 1987 toll increase on behalf of their membership. See New York State Club Ass'n v. City of New York, --- U.S. --

-, 108 S.Ct. 2225, 2232, 101 L.Ed.2d 1, 13 (1988). Second, the state "suability" statutes cited by the defendants bear little application to actions brought against the Port Authority in federal court. The defendants' defense of Eleventh Amendment immunity from suit, however, requires more discussion.

A. Defendants' Immunity from Suit under the Eleventh Amendment

As a general rule, the Eleventh Amendment bars suits against a state brought either by citizens of another state or by its own citizens in federal court. Edelman v. Jordan, 415 U.S. 651, 663, 94 S.Ct. 1347, 1355, 39 L.Ed.2d 662 (1974).

Eleventh Amendment immunity also extends to suits against state agencies such as the Port Authority. See Port Authority Police Benevolent Association,

Inc. v. Port Authority of New York and New Jersey, 819 F.2d 413, 418 (3d Cir.), cert. denied, --- U.S. ---, 108 S.Ct. 344, 98 L.Ed.2d 370 (1987); Feeney v. PATH, 87 Civ. 9256 (S.D.N.Y. August 11, 1988); Borough of Fort Lee v. Port Authority of New York and New Jersey, Civ. Action No. 87-1238 (D.N.J. March 14, 1988).[5]

Eleventh Amendment immunity may be waived, however, if (1) the state expressly waives its general immunity to suit in federal court; or (2) Congress abrogates the state's immunity by providing by statute for suits against the state. Welch

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[5] The plaintiffs do not, at this time, challenge the Port Authority's standing to assert the immunity defense as a bi-state agency inasmuch as this issue is presently before the Second Circuit Court of Appeals. See Feeney v. Port Authority Trans-Hudson Corp., 693 F. Supp. 34, 87 Civ. 9256 (S.D.N.Y), appeal docketed, No. 88-7797 (2d Cir. Sept. 12, 1988).

v. State Department of Highways and Public Transportation, 483 U.S. ---, 107 S.Ct. 2941, 2945-47, 97 L.Ed.2d 389 (1987). The courts, however, will find a waiver by the state "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" Edelman, 415 U.S. at 673, 94 S.Ct. at 1359 (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171, 29 S.Ct. 458, 464, 53 L.Ed. 742 (1909)). Similarly, Congress must "unequivocally" express its intention to abrogate the Eleventh Amendment in "unmistakabl[e]" language in the statute itself. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242, 243, 105 S.Ct. 3142, 3147, 87 L.Ed.2d 171 (1985).

The Auto Clubs contend that Congress abrogated the Port Authority's immunity when it enacted a comprehensive federal regulatory scheme under the Bridge Act to adjudicate challenges to the bridge tolls, with exclusive federal review of determinations made by the Administrator under the Administrative Procedure Act, 5 U.S.C. § 702 (1962).[6] Specifically, the Auto Clubs assert that congress necessarily abrogated the Port Authority's immunity when it originally subjected all "persons" (including municipalities) to the Bridge

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[6] 5 U.S.C. § 702 provides in relevant part:

> A person suffering legal wrong because of agency action...is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages...shall not be dismissed on the ground that it is against the United States.

Act's mandate that all tolls be just and reasonable.[7]

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[7] Section 494 of the General Bridge Act formerly provided:

> The persons owning or operating [bridges governed by the General Bridge Act] shall maintain, at their own expense, such lights and other signals thereon as the Commandant of the coast Guard shall prescribe....If tolls shall be charged for the transit over any bridge constructed under the provisions of the General Bridge Act...such tolls shall be reasonable and just, and the Secretary of Transportation may, at any time, and from time to time, prescribe the reasonable rates of toll for such transit over such bridge....

33 U.S.C. § 494 (1982).

Section 497 of the Act then went on:

> The word "persons" as used in [section 494]...- shall include municipalities, quasi municipal corporations, corporations, companies, and associations.

Id. at § 497 (1982).

This argument fails for several reasons. First, the General Bridge Act was repealed in 1987 and replaced by the Federal Highway Act, 33 U.S.C. § 508 (Supp. V 1987), which omits all references to "persons" subject to the General Bridge Act. Second, the mere conferral of federal (as opposed to state) jurisdiction over toll disputes does not necessarily eliminate the availability of Eleventh Amendment immunity if those toll disputes involve facilities owned by state governmental entities: it controls the plaintiffs' choice of forum in challenging such tolls, but does not control the plaintiffs' choice of defendants against whom they may assert the challenge. In short, the language of 33 U.S.C. § 508 does not constitute an "unequivocal" waiver of Eleventh Amendment immunity required by the

Supreme Court in Atascadero and Welch, supra.

The Eleventh Amendment does not, however, preclude suit against state officials in federal court if the relief sought is prospective in nature. Edelman v. Jordan, 415 U.S. 651, 667, 94 S.Ct. 1347, 1362, 39 L.Ed.2d 662 (1974) ("a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, and may not include a retroactive award which requires the payment of funds from the state treasury"). This is true regardless of whether such payment is characterized as monetary damages, as "equitable restitution," or as a "constructive trust" of funds which are alleged to have been improperly obtained by defendants in the first place. Id.

(equitable restitution); Comm. of Pennsylvania Dept. of Environ. Res. v. Williamsport Sanitary Auth., 497 F. Supp. 1173, 1195 (M.D. Pa. 1980) ("For Eleventh Amendment purposes, there is no distinction between damages, imposition of a constructive trust or injunctive relief requiring [the state] to pay [the prevailing party] $198,600.00").

Accordingly, all of the Auto Clubs' claims must be dismissed insofar as they request relief from the Port Authority directly, or insofar as they request relief from the Port Authority Commissioners that is not purely prospective. That is, the third and fourth claims (for the imposition of a constructive trust and for equitable restitution) must be dismissed altogether; the second and fifth claims (for injunctive relief) must be dismissed insofar as they

request the Court to direct that funds received pursuant to the toll increase be applied to reduce future tolls to a level below that which existed prior to 1987; and the first claim (for declaratory relief) remains intact against the Commissioner defendants.

B. Plaintiffs' Claims for Prospective Relief under the Highway Act

Plaintiffs' claims under the Highway Act center on whether the Port Authority's 1987 toll increase was "just and reasonable" under the Act. The determination of whether the toll increase is "just and reasonable" in turn depends on two considerations: (1) whether Port Authority ITN facilities other than bridges, tunnels, and terminals may be included in the initial rate base upon

which its rates of return are derived, and (2) whether the toll increase produces a reasonable rate of return upon the Port Authority's investment in the ITN facilities which are included in its rate base.

The Auto Clubs contend that PATH cannot be included in the Port Authority rate base for two reasons. First, it asserts that there is no relationship between the PATH and the Staten Island Bridges, and only a small relationship between the PATH and the George Washington Bridge. Second, it asserts that the Port Authority has not made reasonable efforts to maximize PATH revenues such that it would be unjust and unreasonable to require motorists to continue to subsidize PATH's deficit operations by subsuming it into the rate base.

Neither the legislative history of the Highway Act or its predecessor, the General Bridge Act of 1906, shed much light on the degree to which the Port Authority facilities at issue must be related in order to include them in the same rate base. The Conference Report on the Highway Act does, however, indicates some flexibility in including facilities other than bridges, tunnels and terminals in the Port Authority rate base:

> This just and reasonable requirement [under 33 U.S.C. § 508] is not intended to interfere with or in any way restrict existing authority granted to multi-modal transportation agencies, such as the Port Authority of New York and New Jersey, that operate bridges along with other facilities to use bridge toll revenues for non-bridge purposes or the pooling or combination of the revenues from all of their facilities.

H.R. Rep. No. 100-27, 100th Cong., 1st Sess. 175, reprinted in 1987 U.S. Code

Cong. & Admin. News 66, 159 (emphasis added).

This view is bolstered by Congress' contemporaneous repeal of Section 506 of the General Bridge Act of 1946, 33 U.S.C. § 529 (1982), which had expressly limited the use of toll revenues to specific bridge-related purposes.[8]

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[8] 33 U.S.C. § 529 formerly provided:

> If tolls are charged for the use of an interstate bridge constructed or taken over or acquired by a State...the rates of toll shall be so adjusted as to provide a fund sufficient to pay for the reasonable cost of maintaining, repairing, and operating the bridge and its approaches under economical management, and to provide a sinking fund sufficient to amortize the amount paid therefor, including reasonable interest and financing cost... - . After a sinking fund sufficient for such amortization shall have been so provided, such bridge shall thereafter be maintained and operated free of tolls.

No cases to date have interpreted the new "just and reasonable" provisions of the Highway Act. However, the sparse case law under the General Bridge Act also suggests that facilities other than bridges may be used in the same rate base.

In Clarksburg-Columbus Short Route Bridge Co. v. Woodring, 67 App. D.C. 44, 89 F.2d 788, remanded for dismissal as moot, 302 U.S. 658, 58 S.Ct. 365, 82 L.Ed. 509 (1937), the Court of Appeals disapproved of the mandatory lowering of a bridge toll without taking into consideration the effect of the decrease upon the owner of a competing bridge. In so holding, the court established the principle that a toll producing a seemingly unreasonably high rate of return may in fact be reasonable if its rate base does not include other

facilities which are related to the facility in question.[9]

Of course, the most closely-related decisions to the present are those rendered by this Court and by the Second Circuit in Automobile Club of New York, Inc. v. Cox., 444 F. Supp. 174 (S.D.N.Y. 1978), aff'd, 592 F.2d 658 (2d Cir. 1979).

In 1978 this Court denied the Auto Clubs' motion for a preliminary injunction

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[9] In the only other case addressing the "just and reasonable" provisions of the General Bridge Act, City of Burlington v. Turner, 336 F. Supp. 594 (S.D. Iowa 1972), mod'd and aff'd, 471 F.2d 120 (8th Cir. 1973), the Court of Appeals remanded the case to the Federal Highway Administrator, directing that the definition of "reasonable and just" include a reasonable return on invested capital. 471 F.2d at 123. This holding, however, does not address the issue of whether non-bridge facilities may be included in the Port Authority's rate base; rather, it relates only to the question of whether a rate or return is reasonable once the rate base has been established.

to prevent enforcement of the Port Authority's bridge toll increases. The Court rejected the Auto Clubs' argument that only the Port Authority's bridges could be included in the rate base, and upheld the Administrator's determination that the rate base could include not only the Port Authority's bridges, but its tunnels, bus terminals, and PATH system as well. 444 F. Supp. at 177.

The Second Circuit (Friendly, J.) affirmed the district court in an opinion which noted that the inclusion of the PATH system in the rate base for setting bridge tolls was a "serious question" in light of Congress' failure to enact legislation specifically permitting or prohibiting the Port Authority to use surplus bridge tolls to finance the PATH trains:

> [T]he inclusion of PATH is still a giant leap from anything previously taken into account in

> determining appropriate rates under the "reasonable and just" provision of the General Bridge Act of 1906. The PA witness stated that, because of its location, the George Washington Bridge traffic is "predominately peripheral"; shutting down PATH thus would affect it in the first instance less than the tunnels; it is the overcrowding of the latter that might congest the Bridge. The question was not whether PATH requires subsidization but whether, in the absence of Congressional action such as the 1952 legislation concerning DRPA,[10] PATH can properly be loaded onto users of the PA bridges--three of which have almost no functional relationship and the fourth, the George Washington Bridge, only a small one.

592 F.2d at 672 (footnote supplied).

Judge Friendly finally concluded that because it appeared that the Federal

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[10] The Delaware River Port Authority (DRPA) was governed by the new General Bridge Act of 1946, 33 U.S.C. §§ 525-33 (1982), which tightly restricted the uses to which the DRPA's toll revenues could be used. See footnote 8, supra. These provisions were later repealed by the Highway Act of 1987.

Highway Administrator was confronted with two difficult options--to include only bridges in the rate base, versus including bridges, tunnels, terminals and PATH in the rate base--the choice in favor of the latter should be left undisturbed:

> We therefore affirm, but with the caveat that this shall not be deemed to constitute an approval or rejection of the Administrator's action or to preclude a new protest, taking account of points raised in this opinion and others, unless new legislation or the regulations required by § 133(b) of the Federal-Aid Highway Act of 1973, which would remove or alter the points in controversy, is forthcoming within a reasonable time.

Id. at 673.

The specific legislation or regulations to which Judge Friendly alluded have not been forthcoming. In the absence thereof, a source of persuasive guidance exists in gas and electric public utility

ratemaking cases in which courts have interpreted and applied the standard of "just and reasonable" rates. The principles of law utilized therein are applicable as well, by analogy, in the application of the standard of justness and reasonableness of bridge tolls.

In such cases the courts and administrative agencies consistently conclude that "just and reasonable" rates should "enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed." Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 605, 64 S.Ct. 281, 298, 88 L.Ed. 333 (1944).

These same tribunals in turn utilize the "used and useful" principle to determine whether qualitatively different

facilities may be included within one rate base. The principle provides that "an item may be included in a rate base only when it is 'used and useful' in providing service. In other words, current rate payers should bear only legitimate costs of providing service to them." Tennessee Gas Pipeline Co. v. F.E.R.C., 606 F.2d 1094, 1109 (D.C. Cir. 1979), cert. denied, 445 U.S. 920, 100 S.Ct. 1284, 63 L.Ed.2d 605 and 447 U.S. 922, 100 S.Ct. 3012, 65 L.Ed.2d 1113 (1980).

In Natural Gas Pipeline Co. of America v. F.E.R.C., 765 F.2d 1155 (D.C. Cir. 1985), cert. denied, 474 U.S. 1056, 106 S.Ct. 794, 88 L.Ed.2d 771 (1986), for example, the District of Columbia Circuit ultimately upheld the Federal Energy Regulatory Commission's exclusion from a gas pipeline company's rate base those

expenses it incurred in pursuing unsuccessful gas supply projects. In so holding, the Court of Appeals noted the distinction between the inclusion of expenses associated with the pipeline company's unsuccessful gas supply projects, as opposed to those associated with its unsuccessful gas storage projects:

> The Commission has explained that it permitted amortization of losses on these storage projects because the projects "represented an effort on behalf of the companies to improve the quality and quantity of service systemwide. These were not individual projects of a short duration intended for the benefit of a small group of customers to meet a special service requirement"
>
> . . . .
>
> Pipelines must have storage facilities, and efforts to find and secure those facilities are essential to maintaining the ordinary equipment of a pipeline company. Production activities are fundamentally different. It may be prudent and even necessary for pipelines to enter the

> production business . . . if the pipeline's suppliers appear unable to meet future needs of the pipeline's customers. But these production activities are not the normal activity of a pipeline seeking to maintain its physical plant and equipment; they are the normal activity of a producer, to which quite different rules apply.

765 F.2d at 1164-65 (emphasis supplied). The court included in a rate base projects which were "nearly inevitable result[s]" of efforts to meet the demand for the services of the utility. Id. at 1165.

In the same vein, other courts have approved the inclusions of several related activities within the same rate base. See Federal Power Commission v. Texaco, Inc., 417 U.S. 380, 387, 94 S.Ct. 2315, 2321, 41 L.Ed.2d 141 (1974) (upholding an FPC order which would indirectly pool area rates charged by large gas producers with those charged by smaller producers: "[t]hat every

rate of every natural gas company must be just and reasonable does not require the costs of each company to be ascertained and its rates fixed with respect to its own costs"); Papago Tribal Utility Authority v. F.E.R.C., 773 F.2d 1056, 1060 (9th Cir. 1985) (upholding FERC's inclusion of a nuclear power plant meeting increased demand for electricity in the rate base of a statewide electric utility company which had also operated steam electric generating stations, among other facilities), cert. denied, 475 U.S. 1108, 106 S.Ct. 1513, 89 L.Ed.2d 913 (1986); American Public Gas Ass'n v. Federal Power Commission, 567 F.2d 1016, 1049-1051 (D.C. Cir. 1977) (upholding the Federal Power Commission's establishment of national natural gas rates which did not differentiate between onshore and offshore gas sources), cert. denied,

435 U.S. 907, 98 S.Ct. 1456, 55 L.Ed.2d 499 (1978); American Electric Power Service Corp., 37 F.E.R.C. ¶ 63,032 (1986) (upholding an agreement between five electric companies to share costs of ownership and operation of a common high voltage transmission system despite the contention that the agreement inadequately recognized the different levels of benefits conferred on the different companies: "So long as a utilities rate base is used and useful in supplying its customers, a return is earned on the entire investment without consideration of differing benefits conferred by different parts of the investment, and all the same class of customers may be charged the same rates despite the fact that some may benefit more than others"). Cf. Public Service Commission of State of N.Y. v. F.E.R.C.,

813 F.2d 448, 454-56 (D.C. Cir. 1987) (upholding FERC's decision to exclude from gas pipeline's rate base administrative expenses for advertisements intended solely to enhance its parent company's image).

These cases suggest by analogy that those Port Authority activities which represent efforts to improve the quality and quantity of its services systemwide--and do not represent efforts to expand its operations or to provide substantively different types of services--may be included in the Port Authority's rate base.

Similarly, Natural Gas Pipeline's "systemwide" approach suggests that the Court should not utilize a narrow origin-and-destination analysis to determine whether all the Port Authority facilities at issue are sufficiently related to each other to be included in the same rate base.

The "spillover" effect from facility to facility within the Port Authority system indicates that each Port Authority facility, including PATH, contributes to the Port Authority's duty to efficiently provide transportation to passengers and riders over and under the waterways between southern New York and northern New Jersey and vice-versa. See Algonquin Gas Transmission Co., 22 F.E.R.C. ¶ 61,279 (1983) (allowing inclusions of expenses for advertisements "oriented toward information and conservation" in gas pipeline's rate base, despite the fact that an actual showing of direct consumer benefit would be "virtually impossible" to make.)

Given this background of analogous principles, it would seem anomalous to exclude PATH from the Port Authority rate base used to set tolls for its bridges.

The Port Authority was originally created to develop a better coordination of the terminal, transportation and other facilities of commerce in, about, and through the Port of New York District. The precise form in which the Port Authority provides transportation across and under these waterways should not be dispositive: the agency's duty is to provide such transportation efficiently and reasonably--be it by bus, automobile, tunnels, train, or boat. Thus Dr. Marcus's testimony that "it makes no economic sense" to exclude PATH from the network providing all water-crossing transportation on Port Authority facilities seems precisely on point.

Furthermore, the evidence shows (1) there is a direct relationship between PATH and the Lincoln and the Holland tunnels, and that there is at least some

relationship between PATH and the George Washington Bridge; (2) there is at least some relationship between the George Washington Bridge and the Staten Island Bridges--the Bayonne Bridge, the Goethals Bridge, and the Outerbridge Crossing; (3) the Holland Tunnel provides an alternative for the users of the Staten Island bridges and vice-versa; (4) the Lincoln Tunnel provides an alternative for users of the Holland Tunnel; and (5) PATH provides and alternative for those passengers wishing to get into Herald Square in the CBD (Central Business District).

Once this is established, the Auto Clubs are on "weak ground" in opposing the combination of all the facilities among which there exists this conceded relationship. The public utility case law suggests that the Court must consider the

systemwide connection between its ITN facilities, and the "almost inevitable" consequences of the Port Authority's attempts to provide efficient transportation over the waterways. The fact that the Port Authority already feels compelled to institute a ferry system, for example, to fulfill the increased demand for its cross-water transportation facilities illustrates the problem quite graphically.

The absence of specific statutory authorization to include PATH in the rate base for bridges should not prevent the Court from doing so. In the "used and useful" cases cited above, the only guidelines mandated by statute were that the rates be "just and reasonable."

As further objection to the inclusion of PATH's deficits in the rate base, the

Auto Clubs assert that PATH has not conducted any studies measuring the impact of a PATH fare increase on PATH ridership and therefore has not made reasonable efforts to maximize PATH revenues.

While it does not appear that the Port Authority conducted any formal studies on the effect of various PATH fare levels on PATH ridership, the trial evidence indicated that the PATH Board "knew" that every ten-cent increase in PATH fares produces about $6 million in revenue if ridership remains constant. With this figure in mind, the Port Authority Board considered a number of factors in deciding whether to raise its bridge and tunnel tolls and/or its PATH fares in early 1987: the administrative convenience of charging "round figures" for its tolls and fares, the amount of net revenue yield generated

by each level of increase, and so on. The trial testimony also showed that the expenses incurred by PATH in providing mass transit services to its passengers are reasonable and necessary and consistent with the Port Authority's duty to maintain tolls that are fair and reasonable. These factors, combined with the fact that PATH's returns are in line with other urban subway transit systems which typically only recoup about 50% of their expenses through passenger fares, suggest that the Port Authority addressed the question raised by the Auto Clubs and justly and reasonably reached its decision to raise tolls and fares in early 1987 to cover the operating and capital costs of all ITN facilities, and that the users of PATH are paying a fair share of the expenses of crossing the Hudson.

And, since the Auto Clubs have conceded that the rates of return on the Port Authority's investment are "within the zone of reasonableness" once PATH is included in the rate base, the Auto Clubs' claims for prospective relief under the Federal Highway Act must accordingly be dismissed.

B. Defendants' Alleged Violation of the Commerce Clause

The Auto Clubs further claim that defendants' imposition of tolls which generate revenues well in excess of those necessary for construction, operation, and maintenance of its bridges, tunnels and terminals imposes an excessive burden on interstate commerce in violation of the Commerce Clause.

Where Congress has not pre-empted the states from regulating interstate commerce in a given area, the courts employ a three-part test to determine the validity of a state's regulation of such activity under the Commerce Clause:

> (1) whether the challenged [state action] regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the [state action] serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

Hughes v. Oklahoma, 441 U.S. 322, 336, 99 S.Ct. 1727, 1736, 60 L.Ed.2d 250 (1979).

The Auto Clubs have not produced any facts which would support a claim of constitutional infringement under this test: the toll serves a legitimate local purpose, it almost certainly does not have

anything more than an incidental effect upon interstate commerce (since it does not interfere with a whole host of other means of access to the city), and plaintiffs suggest no alternatives to the toll which would not also have an effect on interstate commerce. Moreover, the propriety of including PATH in the Port Authority rate base by definition leads to the conclusion that such inclusion of PATH does not constitute an "excessive" burden on commerce.

C. Defendants' Alleged Violation of 42 U.S.C. § 1983

Because the Auto Clubs' § 1983 claim against the Commissioner defendants is wholly dependent upon the Court's determination of whether the Port Authority (and thereby the Commissioners) violated

the Highway Act or the Commerce Clause of the Constitution, the above discussion also controls the disposition of the defendants' Fifth Claim for relief for defendants for relief for defendants' alleged violation of 42 U.S.C. § 1983.

Conclusion

Plaintiffs' Amended Complaint is accordingly dismissed on the merits and judgment is directed in favor of the defendants and against the plaintiffs, with costs.

The foregoing, together with the additional specific findings of fact and conclusions of law filed herewith, shall constitute the Findings of Fact and Conclusions of Law required by Fed. R. Civ. P. 52(a).

SO ORDERED

Dated: New York, New York
February 9, 1989

s/ Milton Pollack

Senior United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AUTOMOBILE CLUB OF NEW YORK, INC., and AAA CLUBS OF NEW JERSEY,	:	87 CIV. 2419 (MP)
Plaintiffs,	:	
- against -	:	JUDGMENT
THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, et al.,	:	
Defendants.	:	

A non-jury trial before the Honorable Milton Pollack, Senior United States District Judge having begun on November 28, 1988, and at the conclusion of the trial the Court having reserved its decision; and the Court thereafter on February 9, 1989, having handed down its Findings of Fact and Conclusions of Law dismissing plaintiffs' amended complaint on the merits and directing judgment in favor of the defendants and against the plaintiffs, with costs, it is,

ORDERED, ADJUDGED AND DECREED: That the amended complaint be and it is hereby dismissed on the merits, with costs.

DATED: NEW YORK, NY
February 17, 1989

S/Raymond F. Burghardt
Clerk

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 2/21/89.

FILED, FEB 17 1989,
CLERK, U.S. DISTRICT COURT

The Port Authority of New York and New Jersey
Interstate Transportation Network
1986 Operating Results and
Rate of Return on Unamortized Investment in Use
($ in millions)

	Revenues from Operations (1)	Operating Expenses (2)	Depreciation & Amortization (3)	Income from Operations (4)	Unamortized Investment In Use (5)	Rate of Return on Unamortized Investment in Use (%) (6)
Holland Tunnel	$25.1	$29.9	$2.0	($6.8)	$57.3	negative
Lincoln Tunnel	41.7	39.4	4.3	(2.0)	152.2	negative
GWB & Bus Station	104.5	54.6	4.9	45.0	170.8	26.3
Bayonne Bridge	4.7	4.4	0.2	0.1	12.9	0.8
Goethals Bridge	24.6	12.8	0.6	11.2	17.9	62.6
Outerbridge Crossing	22.2	11.3	0.6	10.3	20.3	50.7
P.A. Bus Terminal	20.9	44.1	4.3	(27.5)	188.4	negative
Subtotal—Tunnels, Bridges & Terminals	243.7	196.5	16.9	30.3	619.8	4.9
PATH	49.0	132.0	9.2	(92.2)	175.4	negative
Subtotal—Tunnels, Bridges, Terminals & PATH	292.7	328.5	26.1	(61.9)	795.2	negative

P.A. Bus Programs	0.0	0.0	28.8	(28.8)	242.3	negative
Total—Interstate Transportation Network	$292.7	$328.5	$54.9	($90.7)	$1,037.5*	negative

* Excludes work in progress totalling $223.2 Million (average of beginning and end of year).

NOTES:

(1) Defined as gross operating revenues plus interdepartmental revenues (rents received from other P.A. operations).

(2) Defined as operating and maintenance expenses plus allocated general administrative and development expenses. General administrative expenses are allocated on a labor base; development expenses are allocated on the basis of net operating revenues after fixed charges.

(3) Asset lives used in the calculation of depreciation are generally as follows:

Tunnels and Bridges—	100 years
Buildings—	25 to 50 years
Machinery and Equipment—	5 to 35 years

(4) Defined as revenues from operations less operating expenses less depreciation and amortization.

(5) Average of beginning (1/1) and end (12/31) of year, net of accumulated depreciation. Net of cumulative federal aid amounts received of $6.4 million—Lincoln Tunnel; $14.0 million—GWB; and $44.3 million—PATH & JSTC; which have been adjusted for depreciation.

(6) Defined as income from operations divided by unamortized investment in use.

The Port Authority of New York and New Jersey
Interstate Transportation Network
1987 Operating Results and
Rate of Return on Unamortized Investment in Use
($ in millions)

	Revenues from Operations (1)	Operating Expenses (2)	Depreciation & Amortization (3)	Income from Operations (4)	Unamortized Investment In Use (5)	Rate of Return on Unamortized Investment in Use (%) (6)
Holland Tunnel	$38.6	$31.2	$2.6	$4.8	$77.1	6.2
Lincoln Tunnel	56.3	43.0	4.1	9.2	149.7	6.1
GWB & Bus Station	153.8	62.8	5.0	86.0	176.8	48.6
Bayonne Bridge	6.5	6.1	0.2	0.2	12.6	1.6
Goethals Bridge	37.2	14.3	0.6	22.3	17.4	128.2
Outerbridge Crossing	33.5	13.5	0.7	19.3	19.2	100.5
P.A. Bus Terminal	22.7	52.3	4.3	(33.9)	185.3	negative
Subtotal—Tunnels, Bridges & Terminals	348.6	223.2	17.5	107.9	638.1	16.9
PATH	60.6	135.6	12.9	(87.9)	272.6	negative
Subtotal—Tunnels, Bridges, Terminals & PATH	409.2	358.8	30.4	20.0	910.7	2.2

P.A. Bus Programs	0.0	0.0	30.7	(30.7)	249.6	negative
Regional Transp. Projects	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL—Interstate Transportation Network	$409.2	$358.8	$61.1	($10.7)	$1,160.3*	negative

* Excludes work in progress totalling $343.8 million (average of beginning and end of year).

NOTES:

(1) Results include gross operating revenues but exclude interdepartmental revenues, which are not a component of the forecast. Interdepartmental revenues amount to less than 1% of total revenues from operations. The tunnels and bridges tolls schedules and the PATH fare ware adjusted effective April 12, 1987. The cash auto tolls were increased from $2.00 to $3.00; the truck toll from $1.50 per axle to $3.00 per axle; the commuter discount book from $20.00 per book of 20 tickets to $40.00 per book; and the PATH fare from $0.75 to $1.00.

(2) Defined as operating and maintenance expenses plus allocated general administrative and development expenses. General administrative expenses are allocated on a labor base; development expenses are allocated on the basis of net operating revenues after fixed charges.

(3) Asset lives used in the calculation of depreciation are generally as follows:

Tunnels and Bridges—	100 years
Buildings—	25 to 50 years
Machinery and Equipment—	5 to 35 years

(4) Defined as revenues from operations less operating expenses less depreciation and amortization.

(5) Average of beginning (1/1) and end (12/31) of year, net of accumulated depreciation. Net of cumulative federal aid amounts received of $6.4 million—Lincoln Tunnel; $14.0 million—GWB; and $44.3 million—PATH & JSTC; which have been adjusted for depreciation.

(6) Defined as income from operations divided by unamortized investment in use.

The Port Authority of New York and New Jersey
Interstate Transportation Network
1988 Projected Operating Results and
Rate of Return on Unamortized Investment in Use
($ in millions)

	Revenues from Operations (1)	Operating Expenses (2)	Depreciation & Amortization (3)	Income from Operations (4)	Unamortized Investment In Use (5)	Rate of Return on Unamortized Investment in Use (%) (6)
Holland Tunnel	$45.5	$35.5	$2.6	$7.4	$88.5	8.4
Lincoln Tunnel	63.6	46.0	4.3	13.3	151.9	8.8
GWB & Bus Station	176.9	67.8	5.7	103.4	181.0	57.1
Bayonne Bridge	7.5	10.8	0.2	(3.5)	13.0	negative
Goethals Bridge	42.5	15.3	0.6	26.6	17.4	152.9
Outerbridge Crossing	38.9	15.0	0.7	23.2	18.4	126.1
P.A. Bus Terminal	21.8	59.5	4.4	(42.1)	183.5	negative
Subtotal—Tunnels, Bridges & Terminals	396.7	249.9	18.5	128.3	653.7	19.6
PATH	63.7	153.0	19.8	(109.1)	338.7	negative
Subtotal—Tunnels, Bridges, Terminals & PATH	460.4	402.9	38.3	19.2	992.4	1.9

Ferry Service	0.0	0.0	0.0	0.0	0.6	0.0
Subtotal—Tunnels, Bridges, Terminals, PATH & Ferry	460.4	402.9	38.3	19.2	993.0	0.0
P.A. Bus Programs	0.0	0.0	35.1	(35.1)	251.7	negative
Regional Transp. Projects	0.0	0.0	0.0	0.0	7.0	0.0
TOTAL—Interstate Transportation Network	$460.4	$402.9	$73.4	($15.9)	$1,251.7*	negative

* Excludes work in progress totalling $410.0 million (average of beginning and end of year).

NOTES:

(1) Forecasted results include gross operating revenues but exclude interdepartmental revenues, which are not a component of the forecast. Interdepartmental revenues amount to less than 1% of total revenues from operations.

(2) Defined as operating and maintenance expenses plus allocated general administrative and development expenses. General administrative expenses are allocated on a labor base; development expenses are allocated on the basis of net operating revenues after fixed charges.

(3) Asset lives used in the calculation of depreciation are generally as follows:

Tunnels and Bridges—	100 years
Buildings—	25 to 50 years
Machinery and Equipment—	5 to 35 years

(4) Defined as revenues from operations less operating expenses less depreciation and amortization.

(5) Average of beginning (1/1) and end (12/31) of year, net of accumulated depreciation. Net of cumulative federal aid amounts received of $6.4 million—Lincoln Tunnel; $14.0 million—GWB; and $44.3 million—PATH & JSTC; which have been adjusted for depreciation.

(6) Defined as income from operations divided by unamortized investment in use.

The Port Authority of New York and New Jersey
Interstate Transportation Network
1989 Projected Operating Results and
Rate of Return on Unamortized Investment in Use
($ in millions)

	Revenues from Operations (1)	Operating Expenses (2)	Depreciation & Amortization (3)	Income from Operations (4)	Unamortized Investment In Use (5)	Rate of Return on Unamortized Investment in Use (%) (6)
Holland Tunnel	$46.2	$38.3	$3.7	$4.2	$100.4	4.2
Lincoln Tunnel	63.4	47.4	4.6	11.4	156.3	7.3
GWB & Bus Station	179.0	71.8	5.9	101.3	180.9	56.0
Bayonne Bridge	7.2	10.8	0.2	(3.8)	13.9	negative
Goethals Bridge	42.7	15.5	0.6	26.6	17.5	152.0
Outerbridge Crossing	40.5	14.4	0.7	25.4	18.0	141.1
P.A. Bus Terminal	23.1	61.1	4.5	(42.5)	192.8	negative
Subtotal—Tunnels, Bridges & Terminals	402.1	259.3	20.2	122.6	679.8	18.0
PATH	67.0	156.8	20.1	(109.9)	340.6	negative
Subtotal—Tunnels, Bridges, Terminals & PATH	469.1	416.1	40.3	12.7	1,020.4	1.2

Ferry Service	-1.8	0.9	0.1	(2.8)	5.3	negative
Subtotal—Tunnels, Bridges, Terminals, PATH & Ferry	467.3	417.0	40.4	9.9	1,025.7	
P.A. Bus Programs	0.0	0.0	35.8	(35.8)	220.7	negative
Regional Transp. Projects	0.0	0.0	0.6	(0.6)	14.6	negative
TOTAL—Interstate Transportation Network	$467.3	$417.0	$76.8	($26.5)	$1,261.0*	negative

* Excludes work in progress totalling $573.5 million (average of beginning and end of year).

NOTES:

(1) Forecasted results include gross operating revenues but exclude interdepartmental revenues, which are not a component of the forecast. Interdepartmental revenues amount to less than 1% of total revenues from operations.

(2) Defined as operating and maintenance expenses plus allocated general administrative and development expenses. General administrative expenses are allocated on a labor base; development expenses are allocated on the basis of net operating revenues after fixed charges.

(3) Asset lives used in the calculation of depreciation are generally as follows:

Tunnels and Bridges—	100 years
Buildings—	25 to 50 years
Machinery and Equipment—	5 to 35 years

(4) Defined as revenues from operations less operating expenses less depreciation and amortization.

(5) Average of beginning (1/1) and end (12/31) of year, net of accumulated depreciation. Net of cumulative federal aid amounts received of $6.4 million—Lincoln Tunnel; $14.0 million—GWB; and $44.3 million—PATH & JSTC; which have been adjusted for depreciation.

(6) Defined as income from operations divided by unamortized investment in use.

The Port Authority of New York and New Jersey
Interstate Transportation Network
1990 Projected Operating Results and
Rate of Return on Unamortized Investment in Use
($ in millions)

	Revenues from Operations (1)	Operating Expenses (2)	Depreciation & Amortization (3)	Income from Operations (4)	Unamortized Investment In Use (5)	Rate of Return on Unamortized Investment in Use (%) (6)
Holland Tunnel	$45.3	$40.8	$3.8	$0.7	$106.4	0.7
Lincoln Tunnel	64.8	50.5	5.0	9.3	161.2	5.7
GWB & Bus Station	179.2	71.3	6.1	101.8	196.9	51.7
Bayonne Bridge	7.6	10.5	0.3	(3.1)	16.6	negative
Goethals Bridge	43.8	16.5	0.7	26.6	17.4	153.1
Outerbridge Crossing	39.6	15.3	0.7	23.6	17.9	131.9
P.A. Bus Terminal	24.0	65.2	5.5	(46.7)	201.7	negative
Subtotal—Tunnels, Bridges & Terminals	404.3	270.0	22.1	112.2	718.1	15.6
PATH	70.5	167.2	21.6	(118.3)	414.4	negative
Subtotal—Tunnels, Bridges, Terminals & PATH	474.8	437.3	43.7	(6.2)	1,132.5	negative

Ferry Service	(1.6)	1.0	0.5	(3.1)	9.1	negative
Subtotal—Tunnels, Bridges, Terminals, PATH & Ferry	473.2	438.3	44.2	(9.3)	1,141.6	negative
P.A. Bus Programs	0.0	0.0	35.8	(35.8)	184.8	negative
Regional Transp. Projects	0.0	0.0	0.6	(0.6)	68.1	negative
TOTAL—Interstate Transportation Network	$473.2	$438.3	$80.6	($45.7)	$1,394.5*	negative

* Excludes work in progress totalling $637.4 million (average of beginning and end of year).

NOTES:

(1) Forecasted results include gross operating revenues but exclude interdepartmental revenues, which are not a component of the forecast. Interdepartmental revenues amount to less than 1% of total revenues from operations.

(2) Defined as operating and maintenance expenses plus allocated general administrative and development expenses. General administrative expenses are allocated on a labor base; development expenses are allocated on the basis of net operating revenues after fixed charges.

(3) Asset lives used in the calculation of depreciation are generally as follows:

Tunnels and Bridges—	100 years
Buildings—	25 to 50 years
Machinery and Equipment—	5 to 35 years

(4) Defined as revenues from operations less operating expenses less depreciation and amortization.

(5) Average of beginning (1/1) and end (12/31) of year, net of accumulated depreciation. Net of cumulative federal aid amounts received of $6.4 million—Lincoln Tunnel; $14.0 million—GWB; and $44.3 million—PATH & JSTC; which have been adjusted for depreciation.

(6) Defined as income from operations divided by unamortized investment in use.

The Port Authority of New York and New Jersey
Interstate Transportation Network
1991 Projected Operating Results and
Rate of Return on Unamortized Investment in Use
($ in millions)

	Revenues from Operations (1)	Operating Expenses (2)	Depreciation & Amortization (3)	Income from Operations (4)	Unamortized Investment In Use (5)	Rate of Return on Unamortized Investment in Use (%) (6)
Holland Tunnel	$45.3	$43.6	$4.5	($2.8)	$123.9	negative
Lincoln Tunnel	65.4	53.9	5.4	6.1	189.2	3.2
GWB & Bus Station	181.1	75.7	7.7	97.7	212.3	46.0
Bayonne Bridge	7.6	11.2	0.5	(4.1)	18.8	negative
Goethals Bridge	44.6	17.5	0.7	26.4	17.5	150.9
Outerbridge Crossing	40.2	16.2	0.7	23.3	17.9	130.2
P.A. Bus Terminal	24.7	69.6	5.6	(50.5)	199.4	negative
Subtotal—Tunnels, Bridges & Terminals	408.9	287.7	25.1	96.1	779.0	12.3
PATH	72.4	178.4	27.7	(133.7)	531.1	negative
Subtotal—Tunnels, Bridges, Terminals & PATH	481.3	466.1	52.8	(37.6)	1,310.1	negative

Ferry Service	(1.4)	1.0	0.5	(2.9)	8.6	negative
Subtotal—Tunnels, Bridges, Terminals, PATH & Ferry	479.9	467.1	53.3	(40.5)	1,318.7	negative
P.A. Bus Programs	0.0	0.0	35.8	(35.8)	149.0	negative
Regional Transp. Projects	0.0	0.0	4.0	(4.0)	118.6	negative
TOTAL—Interstate Transportation Network	$479.9	$467.1	$93.1	($80.3)	$1,586.3*	negative

* Excludes work in progress totalling $610,8 million (average of beginning and end of year).

NOTES:

(1) Forecasted results include gross operating revenues but exclude interdepartmental revenues, which are not a component of the forecast. Interdepartmental revenues amount to less than 1% of total revenues from operations.

(2) Defined as operating and maintenance expenses plus allocated general administrative and development expenses. General administrative expenses are allocated on a labor base; development expenses are allocated on the basis of net operating revenues after fixed charges.

(3) Asset lives used in the calculation of depreciation are generally as follows:

Tunnels and Bridges—	100 years
Buildings—	25 to 50 years
Machinery and Equipment—	5 to 35 years

(4) Defined as revenues from operations less operating expenses less depreciation and amortization.

(5) Average of beginning (1/1) and end (12/31) of year, net of accumulated depreciation. Net of cumulative federal aid amounts received of $6.4 million—Lincoln Tunnel; $14.0 million—GWB; and $44.3 million—PATH & JSTC; which have been adjusted for depreciation.

(6) Defined as income from operations divided by unamortized investment in use.

APPENDIX E

U.S. DEPARTMENT OF TRANSPORTATION

FEDERAL HIGHWAY ADMINISTRATION

In the Matter of the Bridges	:	Docket No.
Owned by The Port Authority	:	84-1T
of New York and New Jersey	:	

INVESTIGATION REPORT AND RECOMMENDATIONS

* * *

The previous section of this report has identified the issues raised by the parties in this proceeding. The only major issue involves the composition of investments to be included within the rate base for purposes in this proceeding of determining the rate of return and thus then determining whether the toll increase was reasonable and just within the meaning of 33 U.S.C. 494.

As previously indicated, this involves a legal issue and an interpretation of the court opinion involving the last prior rate increase. Automobile Club of New York, Inc., et al. v. Cox, et al., 592 F.2d 658 (2d Cir. 1978).

The Circuit Court's criticism of the Administrator's prior decision in 1976 including PATH in the rate base is well taken and the fact that PATH should be excluded was recognized by two of the complainants in the instant proceeding. We further can ascertain no basis for the inclusion of the bus programs mentioned in attachment C in the rate base or for the inclusion of any other facilities or programs operated by the Port Authority. The bridge users are protected by assuring that they are only supporting facilities from which they receive a direct and

significant benefit. If the Port Authority were allowed a revenue requirement based on its total activities or on its total surface transportation facilities, it would be free to invest in deficit operations secure in the knowledge that they could charge the bridge users for support of such activities. A finding along those lines would be contrary to the statutory duty to protect the bridge users' interests and would be an abdication of statutory responsibilities.

* * *

RECOMMENDATIONS

For the reasons stated in this report, the Investigation Team recommends that the Administrator make the following findings:

1. As a matter of law, the rate base for the bridge tolls is limited to the four bridges,

two tunnels, and the bus terminal.

2. The rate of return on unamortized investment in use for the combined facilities of the four bridges, two tunnels, and bus terminal is 9.39 percent, and this is within the zone of reasonableness.

3. There are no material factual issues in dispute.

4. The toll rates are reasonable and just.

The Investigation Team also recommends that the Administrator issue an order dismissing the complaints and terminating this proceeding. The parties have 20 days

from the date of this report to submit alternative recommendations to the Federal Highway Administrator.

Respectfully submitted,

THE INVESTIGATION TEAM

Jun 14 1985

/S/ JAMES J. STAPELTON
James J. Stapleton

/S/ KATHLEEN S. MARKMAN
Kathleen S. Markman

3 Attachments

APPENDIX F

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

In the Matter of Bridges Owned by the Port Authority of New York and New Jersey	Docket No. 84-1T

ORDER OF THE ADMINISTRATOR

Following complaints received by the Administrator concerning the January 1, 1984, toll increase on bridges owned by the Port Authority of New York and New Jersey (Port Authority), the Administrator, by Notice of Complaint dated January 9, 1984, established an Investigation Team pursuant to the Federal Highway Administration's (FHWA) Toll Procedural Rules (49 CFR 310). The Team submitted its final report on June 14, 1985.

The matter is now before the Administrator to determine whether, from the record compiled by the Investigation Team, a formal hearing is required or, if not, whether the tolls imposed by the Port Authority are reasonable and just.

The bridges in question are the George Washington, Goethals, Bayonne, and the Outerbridge Crossing.

The Investigation Team, in conducting its investigation, compiled a voluminous record, consisting of interrogatories and answers thereto. The Team prepared a draft report which was submitted to all parties on April 26, 1985. The parties were given an opportunity to comment on the draft report. Comments were submitted by the Port Authority. The comments are discussed in the final report on pages 16-18. Further, in the submission of the final report by the

Investigation Team on June 14, 1985, the parties were allowed 20 days to submit alternative recommendations.

The Administrator hereby adopts the Investigation Team's report as his own. A copy of the report is attached, and is incorporated herein by reference.

FINDINGS

For the reasons stated in the Investigation Team's Report, the Administrator finds:

1. As a matter of law, the rate base for the bridge tolls is limited to the four bridges, two tunnels, and the bus terminal.

2. The rate of return on unamortized investment in use for the combined

facilities of the four bridges, two tunnels, and bus terminal is 9.39 percent, and that is within the zone of reasonableness.

3. There are no material factual issues in dispute.

4. The toll rates are reasonable and just.

ORDER

The complaints filed in this proceeding are hereby disissed, and the proceeding is terminated.

Within 20 days after the date of this Order, any party may petition the Administrator for reconsideration of the Order. After due consideration of such

petitions, the Administrator will take appropriate action.

Issued this day of 1985.

/S/ RAY BARNHART

Jun 19 1985

Attachment:
Investigation Report
and Recommendations

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
AUTOMOBILE CLUB OF NEW YORK, INC. and AAA CLUBS OF NEW JERSEY,

Plaintiffs,

v. 87 Civ. 2419 (MP)

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, et al.,

Defendants.
----------x

November 28, 1988
10:00 a.m.

Before:

HON. MILTON POLLACK

District Judge

APPEARANCES

KISSAM & HALPIN
Attorneys for plaintiffs
ANTHONY S. GENOVESE
JOHN D'ERCOLE
Of counsel

JOSEPH LESSER
Attorney for defendants
ARTHUR BERG
MILTON PACHTER

SHOLOM FRIEDMAN
Of counsel

* * *

Q. Is that group of facilities, the Verrazano Bridge and the Staten Island Bridge, is that called the Southern Bypass?

A. Yes, that is part of its function is to serve as southern bypass and part of the George Washington's function is to serve as the northern bypass.

* * *

THE COURT: The ferry is being promoted on the idea that it is going to downtown Manhattan, isn't it?

THE WITNESS: Yes, from Hoboken to Battery Park City.

Q. What hours will this ferry service work?

A. I believe mainly during the peak periods.

Q. And what is it designed to do? To take the excess load of Path into the ferries?

A. Path unfortunately is a fixed system and even though we can add trains and add cars to train lengths, there is a limited capacity that Path has because of the fixed system. And our projection showed that at some point we would exceed that capacity. So that we had to have another system to fill that void. We recommended our commissioners accept the ferry program as to relief to Path.

Q. I take it the ferries will be somewhat of a relief of Path and the Path functions as a relief to the rest of the system?

A. Yes. I know Hazel Gluck, who is the Commissioner of Transportation for the State of New Jersey, she in all of her

public remarks keeps talking about the need. The only thing that is going to save our region is to encourage more and more people to use mass transportation. It is not only an interstate problem, it is also a very serious intrastate problem. There are just too many people in automobiles.

Feeder roads to various central places of work are jammed morning and evening. So fortunately a good number of people in our region do use mass transportation or we would have gridlock every day. But it is the role of the Port Authority and other people responsible for transportation in the area to continue to improve and encourage use of mass transportation. That is the only thing that is going to actually keep our region going.

Q. Earlier this morning, the word spill over was used. What does that mean to you?

A. I have coined a phrase domino effect when I look at our network. If you take our six river crossings and you throw in another domino for Path and another domino for the bus terminal and you remove all of the center dominoes, there will be no relationship between the first and last domino. But when you put all the dominoes back and you push the first one, they all go down.

And it is for that reason, that I feel strongly that Path is an essential ingredient in our network and that without it, the Holland Tunnel becomes overtaxed and the Lincoln Tunnel become overtaxed. When that happens during peak period, we don't have a convenient tunnel or bridge.

Something that is not being used where we can divert people to.

People start to shift. If they hear on the radio, there is a significant problem at one facility, they will move to an adjacent facility. And as that gets jammed, they will move to an adjacent facility. It is not the person from George Washington that ends up at Outerbridge but the slug of traffic moves down the river.

I know this from experience and having watched the operation from a helicopter from time to time and from time to time again in the morning peak to see if there was ways to improve the operation. You take George Meade from the WOR helicopter. If he makes a side comment, "Stay away from the Holland Tunnel", that creates havoc with overflow with our facilities.

We had to tell them, "Look, one flat tire doesn't mean we steer people away from the Holland Tunnel. When the queues are back to here, that is a ten-minute wait. When the queues are back to here, that is a half hour. Let's use the same standard to move traffic from the Holland to the Goethals."

There are people that have an equal shot at Goethals or Holland. They may opt for one or the other depending on what you tell them. It is hard to get into people's minds. But we are reporting or the helicopters are reporting "Stay away from the Holland Tunnel", they have an equal shot at the Goethals and Outerbridge. When they hear there is a jam up at the Goethals, they will go for the OuterBridge. That is what I call spill over or the domino effect. That is why I feel if you take any one of

the facilities including Path out of the network, the entire network breaks down.

If we didn't have Path in this system, the situation would have been intolerable in the late '70s and in the early '80s. I think we would have had an unacceptable level of service on a daily basis at most if not all of our river crossings were we without Path.

* * *

Q. You don't know whether prior to 1962 there was a functional relationship between the tubes and the tunnels?

A. I think there probably always has been a functional relationship, but going back 25 years or more, we didn't face the situation we have been faced with in the last ten years, where almost every transportation facility under our

jurisdiction and others is taxed to capacity during the peak period.

I think before there was excess capacity across various systems people didn't focus on interrelationships that much or even have to worry about it that much.

* * *

Q. Now, you told us there was a PATH strike in 1980 and you knew a little more about that strike.

Do you recall the PATH strike in 1980?

A. Yes, sir.

Q. Do you recall the effect, if any, that the PATH strike of 1980 had on the other Port Authority facilities?

A. Yes.

Q. All right.

A. I do know that a percentage of the PATH riders shifted to buses, a percentage

shifted to auto and a percentage shifted to rail. The exact percentages I don't know. I do know I think it was somewhere in the 20-something percent range that shifted to auto.

Q. Can we talk about facilities first?

Do you know what effect, if any, the 1980 PATH strike had on the George Washington Bridge?

A. In exact numbers I do not know, except I believe -- I recall that a percentage of former PATH riders switching to auto or bus which used the George Washington Bridge. The exact percentage I don't know or the exact number.

Q. Do you know what effect, if any, the 1980 PATH strike had on the Lincoln and Holland Tunnels?

A. Yes. I would think more of the passengers who switched to auto and bus -- more of that traffic was accommodated at the Holland and Lincoln Tunnels.

Q. Do you know numbers?

A. No, I don't, sir. It may be in one of our exhibits. I'm sure we have it somewhere in our records.

Q. Do you know what effect, if any, the PATH strike had on Staten Island bridges?

A. No, I do not.

Q. Do you know whether it had any effect?

A. No. I don't.

Q. Now, you have referred to a report of the Port Authority. I attract your mention to Court's Exhibit 1 and, in particular, Exhibit D-1 thereto, at page 44,

43 and 44, beginning with the last paragraph on page 43.

If I may, that reads, Mr. Vanacore: "Finally, the interrelationship of PATH and the vehicular crossings can be further illustrated by the impact of a nearly three-month long PATH strike in 1980 which resulted in commuters temporarily diverting to other facilities. Some 29 percent of the the peak period interstate PATH passengers diverted to bus services to Lower Manhattan through the Holland Tunnel. 32 percent diverted to bus services through the Lincoln Tunnel to the Port Authority Bus Terminal. 15 percent diverted to rail services to Penn Station, New York and 16 percent diverted to auto travel across the vehicular crossings Holland Tunnel, Lincoln Tunnel, George Washington Bridge and State Island bridges."

To your knowledge, is that an accurate statement of the facts?

A. Yes.

Q. Do you know, Mr. Vanacore, of the 16 percent who diverted to auto travel across the Holland, Lincoln, George Washington Bridge and Staten Island bridges, what percentage went to the Staten Island bridges, if any?

A. No. I do not.

Q. Do you know what percentage went to the George Washington Bridge?

A. No, I do not.

Q. Do you have any information as to that?

A. I don't have any.

Q. To your knowledge, is there any information in existence other than that which is contained in this report?

A. There may be. I don't know of any that breaks that total percentage into pieces.

Q. I asked you earlier whether you recall reading the opinion of the court of appeals in Cox; do you recall that?

A. I said I believe I had read it at some point.

Q. At page 672 of the court's opinion and I quote, there is a statement as follows: "The question was not whether PATH requires subsidization but whether in the absence of congressional action such as the 1952 legislation concerning DRPA, the huge deficits of PATH can properly be loaded on to users of the PA bridges - three of which almost have no functional relationship and the fourth, the George Washington Bridge only a small one."

Mr. Vanacore, do you disagree with the characterization in the opinion as to the functional relationship between the three Staten Island bridges and the George Washington Bridge as described by Judge Friendly?

A. What year was that?

Q. The opinion was 1979.

A. Number one, the traffic situation today is much different than it was in 1979. A number of facilities that had untapped and unused capacity at that time don't have that capacity today. There have been many changes in development of office buildings on both sides of the Hudson River.

And I don't know if it's fair for me to comment on a statement that was made almost ten years ago in a whole different time frame.

Q. I see. So what you are saying is it may have been accurate then but is not now; is that your testimony?

A. No. I wasn't a party to that proceeding at all and I don't know what the definition of functional relationship was. It could have been a very narrow definition. Functional relationship -- and I'll repeat this, I've said it several times in different ways -- if one uses a very narrow definition of functional relationship, which I don't think is appropriate, based on only O and D and that the only way you can state a functional relationship exists between a number of facilities or among a number of facilities is if any person who wants to use any of those facilities has a full option to use any one of them at any time. That in my opinion is not an appropriate definition.

Having operated these facilities for a good number of years under all kind of conditions and situations and having become very intimate, with an intimate knowledge of what happens, it's not an exact science. What happens on Wednesdays when you have matinees is much different than what happens on Tuesdays and Thursdays. It doesn't lend itself to just the theoretical traffic engineering type of O and D analysis. It's a good input. It's a factor we consider when we consider where there is a need for expansion.

I hope my successor doesn't run those facilities based on just the very narrow view of O and D and what people should do, because depending on traffic conditions, weather, day of the week, month of the year, people's traveling habits change and particularly if we have an

incident or two, either at our facilities or on the New Jersey Turnpike or Garden State Parkway. The situation is not static. I wish it were that simple that you could plug things into a computer and say Joe Jones should get up and go to work this way every day. It doesn't happen that.

It's long answer. If you ask me, I don't disagree. I don't think it would be appropriate for me to disagree with a judge's opinion nine or ten years ago. But I would like to question what the definition of functional relationship was that was used specifically in that opinion, if it's the narrow definition, then I would have to say I agree, but I don't think a narrow definition is at all appropriate, particularly in today's traffic situation.

Q. Finished?

A. Yes.

* * *

Q. Judge Friendly in the following sentence of his opinion, and I read again from page 672, said "There was no showing that it was the level of the previous tolls rather than the convenience of the bridges and tunnels that was drawing traffic away from PATH or that the higher ones would increase PATH ridership."

Focusing on that sentence, Mr. Vanacore, has the Port Authority made any study as to how an increase in bridge and tunnel tolls would affect PATH ridership?

A. I don't recall any.

Q. Has the Port Authority made any study as to how an increase in PATH fares would affect PATH ridership?

A. I don't recall any. I might say that we are a large organization, that does

not mean that those studies haven't been undertaken.

Q. Let me ask you another question: Has the Port Authority made any studies to determine the level at which bridge and tunnel tolls and PATH fares should be set so as to achieve a maximum degree of productivity out of the Port Authority's network?

A. I don't know of any. There may have been.

APPENDIX H

CAPITAL NEEDS AND PLANNING FOR THE PORT AUTHORITY INTERSTATE CROSSWATER FACILITIES

November, 1986

* * *

As suburbanization filled in the areas remote from the rail lines, the population of necessity turned more to rubber-tired vehicles with less dependence on rail even for trips between the suburbs and the central business districts. Further, as the

number of people and job opportunities in the suburbs grew and as the range of services located there expanded, a rapidly increasing demand for inter-suburban travel was created, a market that the region's public transportation system simply could not serve. In terms of travel across the region's interstate waters, this market has grown at a very rapid rate, particularly in the period following World War II. A survey in 1935 indicated that about 38% of the interstate traffic on an average weekday had neither origin nor destination in Manhattan. By 1949, the non-Manhattan element had risen to 44% of the weekday travel across the interstate waterways, in 1972 the non-Manhattan volume had increased to 60% of the weekday movement. The non-Manhattan movement continues at 60% in 1983. On weekends, the non-Manhattan percentage was

even higher-more than two-thirds of the total across-water movement.

* * *

Finally, the interrelationship of PATH and the vehicular crossings can be further illustrated by the impact of a nearly three month long PATH strike in 1980 which resulted in commuters temporarily diverting to other facilities. Some 29% of the peak period interstate PATH passengers diverted to bus services to Lower Manhattan through the Holland Tunnel, 32% diverted to bus services through the Lincoln Tunnel to the Port Authority Bus Terminal, 15% diverted to rail services to Penn Station, New York and 16% diverted to auto travel across the vehicular crossings - Holland Tunnel, Lincoln Tunnel, George Washington Bridge, and Staten Island Bridges.

The examples cited above demonstrate that changes in levels of service on each cross water facility affect the usage on other facilities.

APPENDIX I

STATEN ISLAND BRIDGES STUDY

Preliminary Findings and Recommendations

PORT AUTHORITY OF NEW YORK AND NEW JERSEY

October 1987

Planning and Development Department
Martin E. Robins, Director

Tunnels, Bridges and Terminals Department
Anthony J. Barber, Director

* * *

HOW THE BRIDGES ARE USED

The Goethals Bridge and Outerbridge Crossing serve auto and truck dominated markets; unlike the facilities which feed the Manhattan Central Business District, transit plays virtually no role in this market. Automobiles are the primary users of both bridges during the weekday peaks; truck traffic is heaviest (21% of total

traffic) at the Goethals Bridge eastbound (on weekday mornings). Limited transit exists between Staten Island and New Jersey points today, because the clusters of origins and destinations which are necessary for public transit routes are very dispersed.

* * *

Although far outshadowed by the massive flow of New Yorkers into Manhattan from Staten Island and geographic Long Island, the commutation from New York to New Jersey via the Staten Island Bridges has been increasing. Thus, the Staten Island Bridges, particularly the Goethals and the Outerbridge Crossing, serve as a limited pipeline to New Jersey's expanding job base for New Yorkers. Notwithstanding that this westbound flow over the Staten Island Bridges is only a small number at the

margin, the level of service available to this growing number of commuters is vulnerable to the limited and shrinking available vehicular capacity of the bridges. In addition, preliminary analysis of origin/destination data indicates that as a result of dispersed work sites, transit would be an impractical alternative for most of this market.

APPENDIX J

BEFORE THE

INTERSTATE COMMERCE COMMISSION

BOARD OF SUSPENSION

- - -

REPLY OF

PORT AUTHORITY TRANS-HUDSON CORPORATION

TO PROTESTS AGAINST

INCREASE IN PASSENGER FARES

EFFECTIVE AUGUST 13, 1973

PROVIDED IN ITS TARIFF I.C.C. NO. 5

- - -

Comes now Port Authority Trans-Hudson Corporation and in reply to protests against its tariff I.C.C. No. 5, filed to become effective August 13, 1973, says:

* * *

These conclusions are buttressed by the experience during the recent 9-week PATH strike. During that strike there was a

total cessation of PATH service. PATH passengers were forced to find other means of trans-Hudson transportation. The gap was bridged by increased bus service. Despite the fact that the passengers were obliged to pay a bus fare of 55 cents for the trans-Hudson crossing, and in many instances an additional subway fare of 35 cents to reach destinations formerly reached directly by PATH trains, there was no major increase in private automobile usage. Having these facts in mind, it cannot be reasonably anticipated that the fare increase here proposed, which is obviously substantially less than the added cost incurred by passengers during the strike, will produce a result different from that experienced during the strike with regard to private automobile usage.

* * *

Respectfully submitted,

PORT AUTHORITY TRANS-HUDSON CORPORATION

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APPENDIX K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

AUTOMOBILE CLUB OF NEW YORK INC and AAA CLUBS OF NEW JERSEY,

Plaintiffs,

v. 87 Civ. 2419 (MP)

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, et al.,

Defendants.
----------x

November 29, 1988
10:00 a.m.

(Hearing resumed)

* * *

Q. Did you make any study as to whether if you had increased the PATH fare to $1.50 you would lose any substantial amount of ridership?

A. No study was made of that.

Q. Now, you testified that the change in the schedules which comprised a part of Court's Exhibit 1 was brought about as a result of operating figures which came in, actual figures; is that correct?

A. Yes.

Q. And you further testified that there was a reduction in net revenues; is that correct?

A. That's correct.

Q. Did the reduction in net revenues come from each of the Port Authority's facilities, do you know?

A. Well, it was a combination of factors that pertained to all of our facilities. The actual results were coming in from all of our facilities. Largely though represented in the changes here were obviously changes in network results and primarily in the revenues.

Q. Well, let me be specific. Do you know whether the anticipated revenues from the George Washington Bridge were higher or lower than projected?

A. I could take a look and tell you. Yes. We did look facility by facility to see whether the revenues were higher or lower and then insert the new numbers into it.

Q. Could you look at it?

A. Sure.

If you would go to the unamortized investment in use schedule for 1987.

Q. What document are you referring to?

A. I'm looking at -- in the original court documents, the schedule under Exhibit -- I believe it's Exhibit F. Exhibit F, the year 1987, which is the second schedule under that, rate of return on unamortized

investment in use. That shows revenues from operations at the Holland Tunnel were $42.1 million. In the original schedule in '87, on this second supplemental schedule you see that was reduced to 38.6.

Q. Could you point to the page; that's Court's Exhibit 2, the supplemental?

A. Yes, Exhibit F 1, the first page.

Q. So, with respect to the Holland Tunnel, we had a reduction of, approximately, 3 and a half million dollars; is that correct?

A. Yes.

Q. Am I reading that right?

A. Yes.

Q. Lincoln Tunnel?

A. Lincoln Tunnel was reduced from 59.4 to 56.3, about a three million dollar reduction.

Q. The George Washington Bridge and bus station?

A. 161.7 to 153.8.

Q. The Bayonne Bridge?

A. 7.3 to 6.5.

Q. The Gothals Bridge we had an increase?

A. Gothals Bridge we had an increase from 36.4 to 37.2.

Q. And the Outerbridge Crossing decreased; is that correct?

A. Right, 35.7 to 33.5.

Q. And the PA bus terminal?

A. We had an increase from 21.6 to 22.7.

Q. And with respect to PATH, what was the result there?

A. PATH had an increase from 59.0 to 60.6.

Q. Now, with respect to the bridges and tunnels, Mr. Haupert, with one major exception we had decreases in revenues.

What occasioned, to your knowledge, the decreases in revenues?

A. Well, these were decreases from a projection.

Q. Right.

A. We had projected a certain revenue growth. Again, looking at what was accomplished in 1986 and projecting a standard revenue growth that our management and budget people used, we had projected the operating results you see on the first submission. As the year developed, it became apparent that we were not going to achieve the growth that we had anticipated. So we continually reflected those changes in our results as the actuals came in.

Q. What it comes down to though is that you didn't receive the amount of tolls, is that correct, that you expected you would receive? Isn't that the major ingredient in these projections?

A. Yes.

Q. Yes.

So that the facilities where the operations -- the revenues from operations decreased, as to those facilities you had projected a greater use of those facilities which did not, in fact, materialize?

A. Correct.

APPENDIX L

PORT AUTHORITY PLANNING FOR

$6 TOLLS BY '93

By FRANK J. PRIAL

Tolls for Port Authority bridges and tunnels would rise, to $6, in 1993, and the PATH fare would go up, to $1.50, if a long-range plan released this week becomes a reality.

The proposed increases are outlined in a capital-improvement program, "Business Plan 1990-1994," that calls for raising the $3 bridge and tunnel toll to $4 on April 1, to $5 in October 1991 and to $6 in July 1993. The toll is charged just eastbound on the crossings between New Jersey and New York.

The $1 fare for the PATH rail line, which connects Hudson and Essex Counties

with Manhattan, would go to $1.25 next Jan. 1 and to $1.50 on July 1, 1993.

The proposed increases would not reduce bridge, tunnel or PATH traffic, Port Authority officials said. They said the extra money was needed to pay for maintenance and for ambitious new interstate transportation projects.

The first step, the $1 increase proposed for April, was shelved last month by the commissioners of the Port Authority of New York and New Jersey. The bistate agency refused to vote on the increase after Gov. Thomas H. Kean of New Jersey said he would veto it. However, the executive director of the Port Authority, Stephen Berger, said yesterday that he thought the increase would pass, very possibly by April 1.

"The business plan outlines projects that are not in the current capital-improvement plan," Mr. Berger said. "If you want additional capital work, you have to have a funding source."

Details of the plan appeared yesterday in The Record of Hackensack, N.J.

The plan says the increase proposed for April is needed to carry out the current capital program. That includes refurbishing the Holland Tunnel, which is almost completed; redeveloping PATH, which is under way, and reconditioning the Lincoln Tunnel.

The 1993 increase would also be earmarked for maintaining and rehabilitating the bridges, tunnels and PATH, Mr. Berger said, adding, "We need a toll increase for on-going programs approximately every three years."

The proposed increase for next year would be used to "initiate major new interstate transportation projects, such as those included in Governor Kean's 'Circle of Mobility' program," Mr. Berger said in a statement with the plan. The circle is a far-reaching plan to ease congestion in the northeastern New Jersey corridors leading to the Hudson River crossings into Manhattan.

Neither the expanded capital program nor the additional toll increases to finance it were in the 1990 budget proposal of the Port Authority. That, Mr. Berger said, was "because any agreement on these projects and the revenue needed to support them would clearly require further lengthy and detailed discussions with both states." Discussions on transportation investments will continue with New York and New Jersey officials this year, he said.

Mr. Berger said the only alternative he saw to increased tolls was a regional gasoline tax. "If the two states don't enact a gas tax before the Federal Government does," he said, "they will have missed the best opportunity we'll ever have" for paying for improvements.

He estimated that a 10-cent gasoline tax by New York and New Jersey for transportation projects would help back $10 billion in borrowing.

"Our gasoline is the cheapest in the world," Mr. Berger said. "The Exxon Valdez spill raised prices 20 cents a gallon, and you didn't hear a murmur. But mention a 10-cent tax increase, and everyone is outraged."

A $6 toll would have no appreciable effect on the use of the bridges and tunnels, Mr. Berger said. The bridges are

the George Washington, the Bayonne, the Goethals and the Outerbridge.

"The Triborough Bridge and Tunnel Authority is at $5 a round trip now," he said "and it hasn't affected their business at all." That agency, part of the Metropolitan Transportation Authority, operates bridges and tunnels and a garage in New York City.

The Port Authority's 7.16 billion capital plan would spend $4.16 billion on aviation, mainly airport expansion and renovation. About $549 million would be for tunnels, bridges and terminals, $592 million for PATH and ferries, and $539 million for trade and development.

Mr. Berger emphasized that the Business Plan was preliminary. Its proposals are subject to votes by the 12-member Board of Commissioners. The governor of each state

names six appointees. After the board's approval, either governor can veto the actions.

If the board reconsiders the proposed toll increase for April 1, it would be up to Gov. Mario M. Cuomo, who has not said what he would do, and incoming Gov. James J. Florio to let it stand or veto it. Mr. Florio has said he will study the plan. The Port Authority said the issue might be voted on next month.

The proposal last month for an increase was a surprise. The authority had said its $1 increase in April 1987 was sufficient to meet needs until 1991.

APPENDIX M

Table 1

Toll Bridge Summary by Federal Legislation and Toll Regulation As of June 1974[1]

	Toll Regulation[2]			
	1	2	3	Total
1906 Bridge Act				
Interstate System	3	-	3	6
Other Federal-aid System	11	9	6	26
Other State & Local Roads	10	3	1	14
Total	24	12	10	46
1946 Bridge Act				
Interstate System	1	-	1	2
Other Federal-aid System	1	1	11	13
Other State & Local Roads	1	1	8	10
Total	3	2	20	25
International Bridges				
Interstate System	2	1	-	3
Other Federal-aid System	3	-	-	3
Other State & Local Roads	15	1	1	17
Total	20	2	1	23
U.S.C. 33, section 129(a), Bridges				
Interstate System	-	-	2	2
Other Federal-aid System	-	-	4	4
Other State & Local Roads	-	-	-	-
Total			6	6
Summary				
Interstate System	6	1	6	13
Other Federal-aid System	15	10	21	46
Other State & Local Roads	26	5	10	41
Total	47	16	37	100

[1] There are seven privately owned interstate toll bridges operating which were constructed in the early 1900's and the Federal authorizing statute could not be located. These bridge tolls may be subject to the reasonable and just test.

(Footnotes continued on following page)

[2] **Toll Regulation Codes:**

[1] Tolls must be reasonable and just; Secretary has authority to prescribe reasonable rates from time to time or anytime.

[2] Tolls shall be sufficient to pay reasonable cost of maintaining, repairing and operating bridge and its approaches under economical management and to provide a sinking fund sufficient to amortize cost bridge including reasonable interest and financing costs as soon as possible under reasonable charges. After sinking fund has been provided, bridge shall be operated toll free or tolls shall not exceed amount necessary for proper repair, operating and maintenance. (Sometimes a payback period is specified.)

[3] Same as [2], except tolls may not be continued to recover repair, operation and maintenance costs after sinking fund has been provided, i.e., bridge must be operated free after sinking fund has been provided.

APPENDIX N

133 Rec. H1637
(daily ed. March 31, 1987)
(remarks of Congressmen Molinari, Howard, and Hammerschmidt)

"Mr. Molinari. I thank the gentleman for yielding me this time.

Mr. Speaker, if I could have the attention of the distinguished chairman of the Committee on Public Works and Transportation, Mr. Howard, and the distinguished ranking minority member of the committee, Mr. Hammerschmidt. I would like to engage them in a colloquy to create legislative history on section 135 of the conference report relating to the regulation of tolls.

Subsequent to the House passing the conference report on H.R. 2, a number of

questions have been raised as to whether section 135, or the statement of managers accompanying section 135, changes in any way the 'just and reasonable' standard as it has been applied under existing laws and existing authorities. Would the distinguished chairman and ranking minority member care to comment?

Mr. Howard. Mr. Speaker, if the distinguished gentleman from New York will yield, neither section 135 nor the statement of managers changes the standard to be applied in determining whether a toll increase is just and reasonable. The only thing that we have changed is the forum for making the determination. Toll increases will no longer be subject to review by the Department of Transportation; instead the

decision will be left to the courts in the event of a challenge.

Mr. Hammerschmidt. Mr. Speaker, if the gentleman will yield, I concur with the chairman's response. We have not changed the just and reasonable standard in any way."

APPENDIX O

PORT AUTHORITY TRANS-HUDSON CORPORATION

Memorandum Regarding Fare Increase From 30 Cents to 50 Cents Provided in PATH Tariff I.C.C. No. 5 Issued July 12, 1973 To Become Effective August 13, 1973

The Port Authority Trans-Hudson Corporation (PATH) provides commuter service between Manhattan, New York City, and neighboring New Jersey urban communities. The line of railroad and the stations served are shown on the PATH System Map attached hereto and marked Attachment "A".

A uniform 30-cent fare is now assessed between all stations on the PATH system. It is proposed to increase this fare to 50 cents.

* * *

Appendix A-p.19
Attachment "F"

REPRESENTATIVE FARES

NEW JERSEY TO MANHATTAN

LOCAL MARKETS	BUS	RAIL	PATH
Jersey City	$.45	-	$.30
Hoboken	.55	-	.30
Newark	.60	$.61*	.30
SUBURBAN MARKETS			PATH AND RAIL
Plainfield	$1.39	$1.26	$1.06
Hackensack	.76	-	.92
Ridgewood	.90	-	1.02
Red Bank	1.65	1.29	1.22
Montclair	1.10	-	.90
New Brunswick	1.08	1.24	1.08

NOTE: The above are computed to derive the lowest cost possible by assuming the use of cheapest fares available by use of multiple ride tickets.

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* Single trip - 75¢

No. 89-1346

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AUTOMOBILE CLUB OF NEW YORK, INC. and AAA CLUBS OF NEW JERSEY,

Petitioners,

vs.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, PHILIP D. KALTENBACHER, ROBERT F. WAGNER, RICHARD C. LEONE, JAMES G. HELLMUTH, HENRY F. HENDERSON, JR., WILLIAM K. HUTCHISON, H. CARL McCALL, JOHN G. McGOLDRICK, WILLIAM J. RONAN, HOWARD SCHULMAN, ROBERT VAN BUREN and HAZEL FRANK GLUCK, as Commissioners of the Port Authority of New York and New Jersey,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Port Authority of New York and New Jersey owns and operates an integrated cross-water Interstate Transportation Network linking Southern New York and Northern New Jersey. This Network includes four bridges, two tunnels, one bus terminal and one passenger rail crossing – the Port Authority Trans-Hudson Railroad (PATH).

On April 12, 1987, as a result of rising operating and maintenance costs accompanied by major capital requirements of the Network, the Commissioners of the Port Authority, pursuant to their statutorily granted powers, raised the tolls on the Authority's six vehicular crossings and the fare on PATH. Revenues from these increases are being used to accommodate growth and relieve congestion in the Network, with capital improvements planned for the bridges, tunnels, bus terminal and PATH.

Petitioners challenged the increase in bridge tolls, claiming that the higher tolls were not "just and reasonable" as required by §135(i) of the Federal-Aid Highway Act of 1987, 33 U.S.C.A. §508 (West Supp. 1989). Although petitioners conceded that the "just and reasonable" provision permits the inclusion of bridge-related facilities in the Port Authority's rate base for the purpose of assessing the reasonableness of its bridge tolls, and did not dispute the inclusion of such non-bridge facilities as the tunnels and bus terminal, petitioners argued that PATH, which is part of the Port Authority's Interstate Transportation Network, should have been excluded from the rate base. Petitioners admit that with PATH in the rate base, the Port Authority's rate of return is reasonable.

The question presented is whether the Court of Appeals was correct in affirming the District Court's essentially factual finding that the Port Authority's interstate passenger rail crossing, PATH, is bridge-related, since it provides a substantial benefit to the users of the Port Authority's bridges, and, therefore, is properly includable in the rate base.

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No. 89-1346

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OCTOBER TERM, 1990

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

The Port Authority of New York and New Jersey is a direct agency of the two states created by an interstate compact to which Congress consented (Ch. 154, Laws of N.Y., 1921; Ch. 151, Laws of N.J., 1921; 42 U.S. Stat. 174 (1921)). The Port Authority, pursuant to the 1921 Compact

and subsequently enacted bi-State legislation, operates various terminal, transportation and other facilities of commerce in the statutorily defined Port District, including an integrated cross-water Interstate Transportation Network which includes four bridges, two tunnels, a bus terminal and a rail crossing (PATH).

As noted by the Court of Appeals, "[m]ost of the relevant facts were stipulated by the parties" (A-11)[1], including the fact that the Port Authority's bridges, tunnels, bus terminal and PATH are all involved in the movement of people across the interstate waters of the Port District and together make up the Port Authority's Interstate Transportation Network.

By virtue of its more than sixty years experience in interstate cross-river transportation in the Port District, the Port Authority has found that the efficient and cost-effective functioning of its interstate transportation facilities requires their maintenance and operation as an integrated, interdependent transportation system. It is undisputed that closing one or more of the Port Authority's cross-water facilities results in a "spillover" or "domino" effect, increasing congestion in the others, and that improvements to one facility benefit the users of the others by reducing congestion and making the entire system more efficient.

Both the District Court and the Court of Appeals found that this "spillover" effect established that the Port Authority's bridges, tunnels, bus terminal and PATH form an "integrated, interdependent transportation system" (A-19) and, therefore, justified the inclusion of PATH in the rate base. The Court of Appeals agreed with the

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[1] "A" followed by a designated page number refers to pages in the Petitioners' Appendix.

District Court's determination that "[m]easuring the relationship between river crossings [solely] by means of 'origin and destination' data [as urged by petitioners] . . . fails to take into account the full extent of the Port Authority's responsibilities" (A-25).

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied because the Court of Appeals has correctly resolved the narrow factual issue involved in this case, its decision does not conflict with any decision of this Court or that of any other court of appeals, and the case is of no national importance.

In view of the overwhelming and virtually uncontroverted evidence, as summarized in the Court of Appeals opinion, establishing that PATH is an integral component of the Port Authority's Interstate Transportation Network and, as such, provides a very real and substantial benefit to the users of the Port Authority's bridges, the courts below were clearly correct in holding that it was proper to include PATH in the rate base for purposes of considering the reasonableness of the Authority's bridge tolls. Not only did the Court of Appeals find that the District Court's factual findings were not "clearly erroneous", the appellate court expressly "agree[d]" (A-28) with the trial court's findings.

Petitioners do not dispute that the courts below were correct in analyzing the reasonableness of the Port Authority's bridge tolls by following the "systemwide" approach to ratemaking used in public utility cases. *See, e.g., Natural Gas Pipeline Co. v. FERC*, 765 F.2d 1155, 1164 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986). Rather, petitioners attempt to rely on two previous bridge toll cases, *City of Burlington v. Turner*, 471 F.2d 120 (8th Cir. 1973),

and *Automobile Club of New York, Inc. v. Cox*, 592 F.2d 658 (2d Cir. 1979).

Petitioners' attempted reliance on *City of Burlington* is misplaced since that case involved the use of bridge toll revenues to provide salary increases for the city's policemen and firemen, a purpose which admittedly was unrelated to the city's bridge.

Similarly unavailing is petitioners' attempted reliance on the *Cox* court's description of including PATH in the rate base as a "giant leap" (A-30). First, as pointed out by both the District Court and the Court of Appeals, "the *Cox* court did, in fact, take that leap" (A-31), and unanimously affirmed a District Court decision that the Port Authority's bridge tolls were "reasonable and just" within the meaning of the Bridge Act of 1906, 33 U.S.C.A. §494 (West 1986), based on a rate of return calculation that *included* PATH in the rate base. Second, based on the different factual record in the instant case, the Court of Appeals expressly and succinctly stated that:

> "[W]e find it easier to sustain the Port Authority's position today than the panel did ten years ago" (A-31),

and that:

> ". . . [t]his case has indeed changed during the past ten years, but in the opposite direction [than as claimed by petitioners]; *the facts in the record* now make it easier for us to conclude that PATH should be included in the rate base." (A-37, emphasis added).[2]

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[2] Petitioners' references to purported plans for future toll and fare increases are, of course, irrelevant and completely outside this record. In any event, the Port Authority has not taken any action with respect to any such increases.

Finally, inasmuch as both opinions below were based on the specific "facts in the record" in this case, it is difficult to understand petitioners' characterization of the issues in this case as involving matters of "national importance." The decision which petitioners seek to overturn is applicable only to the facts in this record relating to the Interstate Transportation Network owned and operated by The Port Authority of New York and New Jersey. Contrary to petitioners' contention that:

> "this Court's construction of the just and reasonable clause in the context of this case will impact *upon every one* of the ninety-four bridges whose tolls are now subject to the just and reasonable test . . . ." (Petition, at 28, emphasis added),

the facts are that the vast majority of these bridges are individual crossings, such as the bridge involved in *City of Burlington*. Unlike the Port Authority's bridges, they are not part of any integrated transportation network. Indeed, only one of the owners of these bridges, the Delaware River Port Authority, operates a passenger rail crossing. Clearly, therefore, the decision below is not of national importance.

In view of petitioners' failure to show: that the Court of Appeals incorrectly resolved the narrow, fact-driven issues before it; that the Court of Appeals decision conflicts with any decision of this Court or that of any other court of appeals; or that this case involves issues of national importance, the petition for a writ of certiorari should be denied.

CONCLUSION

The Petition for a Writ of Certiorari Should Be Denied.

Respectfully submitted,

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Dated: March 15, 1990